(22,358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 151.

R. W. STARR, PLAINTIFF IN ERROR,

vs.

LONG JIM AND ANNIE, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1912.

1 8512.

Transcript of Record.

R. W. STARR
v.
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Filed Dec. 9, 1909.

C. S. REINHART, *Clerk.*

2 In the Superior Court of the State of Washington in and for the County of Chelan.

R. W. STARR, Plaintiff,
versus
LONG JIM and ANNIE, His Wife, Defendants.

Complaint.

The Plaintiff states:

1. That he now is, and has been ever since May 1, 1901, the owner in fee simple and in possession of and entitled to the possession of the east half of the northeast quarter and lot one of section eleven; the southwest quarter of the southwest quarter of section twelve; lot one of section fourteen; lot two of thirteen; and all of lot one of section thirteen except lot two block three, lots seven, ten, eleven, and twelve in block seven and lots seventeen and eighteen in block nine of Foote and Starr's Addition to Chelan, Washington; all of the said premises being in township twenty-seven north of range twenty-two East Willamette Meridian and situate in Chelan County, Washington.

2. That the defendants, Long Jim, and Annie, his wife, claim some interest in the premises mentioned in paragraph one of this complaint, adverse to the plaintiff.

3. That the claim of defendants, and each of them, is without right and of no validity whatever, and that the defendants, nor either of them have any estate, right, title, or interest in said premises, or any part thereof.

Wherefore the plaintiff prays:

1. That the defendants, and each of them, be required to set out their claims, and the claims of each and either of them, and that all of the adverse claims of defendants, and each of them, to the said described premises, or any part thereof, be determined
3 by this court; and that the same, be, by decree of this court, declared invalid and of no effect; that plaintiff be declared to be the owner, and of right in the possession of said premises, and every part thereof, against the claims of defendants, or either of them; and that said defendants, and each of them, be perpetually and forever enjoined from setting up any claim to said premises, or any part thereof.

O. R. HOPEWELL,
Attorney for Plaintiff.

STATE OF WASHINGTON,
County of Douglas, ss:

R. W. Starr, being first duly sworn, on oath says, that he is the plaintiff in the foregoing entitled action; that he has read the foregoing petition and knows the contents thereof, and that the statements therein contained are true.

R. W. STARR.

Subscribed and sworn to before me this 24 day of January, A. D. 1907.

[N. P. SEAL.] G. W. HENDRICKS,
Notary Public, Residing in Waterville, Washington.

Filed March 2, 1907, J. L. Campbell, Clerk Chelan County, Wash.

4 In the Superior Court of the State of Washington in and for the County of Chelan.

No. —.

R. W. STARR, Plaintiff,
vs.
LONG JIM and ANNIE, His Wife, Defendants.

Answer.

Come now the defendants in the above entitled action and, in accordance with an order of the court heretofore made herein, for answer to the complaint herein

1. Deny each and every allegation and thing contained in paragraph one (1) of said complaint, except that the real estate therein

described is in Township twenty-seven (27) North of Range Twenty-two (22) East of the Willamette Meridian, situated in Chelan County, Washington.

2. Deny each and every allegation and thing contained in paragraph three (3) in said complaint.

II.

Further answering said complaint and for the affirmative defense thereto, said defendants allege:

1. That they now are, and at all the times herein mentioned were husband and wife and members of that tribe known as the Moses-Columbia Indians of the state of Washington and are full blooded Indians.

2. That on or about the 20th day of April, 1894, the Secretary of the Interior approved an allotment of the land described in the complaint to defendant Long Jim, under the so-called Moses agreement of July 7, 1883, which agreement, with modifications, was confirmed by Act of Congress, approved July 4, 1884 (23 Statutes 7980), which gave to said defendant the use and occupation of said land, the United States, however, retaining the fee thereto and the control thereof as Indian lands.

5 3. That on or about the — day of March, 1900, the plaintiff, R. W. Starr, came to the defendants and falsely and fraudulently represented to, and told them that he, the plaintiff, had by reason of his efforts with the Government in defendant, Long Jim's behalf, more than — years before, became possessed of and owned the south half of the above described lands, being the better and more valuable half thereof, and that said defendants had, because thereof, lost said lands and the title thereto. Said plaintiff also then and there represented to and told the defendants that because of his, the plaintiff's ownership of said south half of said lands, he desired to purchase the other half thereof; that neither of said defendants could read, speak or write the English language, or any other than the Indian language, and were unable to understand or appreciate the ways, conduct, or method of procedure of the white man, nor understand or appreciate in any degree whatever the laws of the state or of the United States, or their right or rights thereunder, and the said defendants being entirely ignorant as to their rights in connection with said lands, and the power or lack of power of said plaintiff in connection therewith, and in their ignorance believed that said plaintiff had, as he had falsely and fraudulently represented, acquired said south half of said allotment legally and by some means or method unknown to said defendants, but recognized by the law of the land and the officers of the Federal and State governments. That being so deceived as aforesaid by said plaintiff and believing that they had lost the said best and most valuable half of said land, and believing that the remaining portion of said land, which was inferior to the said south half and separated from Lake Chelan by it, and was not of so much
6 value with said south half, and being persistently aided in that belief by said plaintiff and by him importuned to sell

the same, the defendants finally told said plaintiff, who assured the defendants that he would pay no more, that they would sell said north and inferior half of said land for two thousand dollars ($2,000.00); that said plaintiff thereupon, by reason of his false and fraudulent representations as aforesaid which these defendants believed to be true, secured the mark of said defendants to a purported deed, which the defendants did not and could not read or understand, but which they were lead to believe and understand because of said plaintiff's representations, conveyed to said Starr the said north half of said allotment and no more; that the Notary Public who acknowledged the execution of said deed could not speak the Indian language, or any language which could be understood or appreciated by these defendants, or either of them; that said Starr thereupon paid to said defendant Long Jim, on account of said purported deed, the sum of Fifteen Hundred Dollars ($1500.00), and to said defendant Annie the sum of Twenty-five ($25.00) and no more, tho' the said defendants then and there demanded the balance of said promised consideration, which balance has never been paid; that at the time said purported deed was signed by these defendants and said money paid to them as aforesaid, neither of them knew the value of said lands, or any of the parts thereof.

4. That these defendants have since learned and ascertained that said purported deed conveyed and purported to convey to the plaintiff the entire allotment, and the execution of said deed as aforesaid by these defendants was brought about entirely by the false and fraudulent representations of said plaintiff. That at the time of the execution of said deed, neither of these defendants knew that said plaintiff did not at the time own the south
7 half thereof, or that the said defendants then owned the south half thereof, as well as the north half thereof, or that the representations made by said plaintiff as aforesaid, or any of them, were untrue, they would not have signed or fixed their mark to said purported deed or accepted said Fifteen hundred and Twenty-five dollars ($1525.00) or any part thereof.

5. That these defendants now are, and at all the times herein mentioned were, the owners of and entitled to the use and occupation of said land, subject only to the title and control of the United States therein, prior to August 2, 1905.

6. That on or about August 2, 1905, under an act of Congress, approved March 3, 1905, a patent was issued by the President of the United States, wherein defendant Long Jim was named as the grantee, covering said land, and said patent has been delivered to said defendant.

7. That these defendants are informed and believe that said lands as a whole were at the time of the purported execution of said deed of the value of more than Twelve Thousand Dollars ($12,000.00), all of which was then and there known to said plaintiff and unknown to these defendants.

Wherefore, These defendants pray for a judgment and decree herein that the plaintiff take nothing; that the above described

lands, and each and every part thereof, are the property of and owned by the defendants, free and clear of and from all claim or claims of said plaintiff, or any one claiming through or under him, and that all cloud or clouds on said defendant's title may be removed and cleared; provided, however, that before such decree shall become of full force and effect, the defendants shall pay into C[illegible] for said plaintiff the sum of Fifteen Hundred and
Tw[illegible]y-five Dollars ($1525.00), with legal interest thereon
8 from the day on which said sum was paid by the plaintiff to said defendants, as stated in the complaint.

That if it should be determined in said action that said plaintiff had collected or secured any money or other article or property of value for the sale, use or lease of said real estate, or any part thereof, that these defendants have judgment against the plaintiff for the amount thereof with legal interest thereon, against which judgment the aforesaid sum of fifteen hundred and twenty-five dollars ($1525.00) and interest may be proportionately and properly an off set.

For such other and further relief for said defendants against the plaintiff as may be meet and proper in the premises, and for costs.

A. G. AVERY,
J. B. LINDSLEY,
Attorneys for Defendants.

STATE OF WASHINGTON,
County of Okanogan, ss:

Long Jim, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has had read to him by an interpreter duly sworn to interpret said answer, said answer, and knows the contents thereof and that the same is true as he verily believes.

his
LONG x JIM.
mark

Witness to mark:
THOMAS McCRASSON.

Subscribed and sworn to before me this 29 day of November, 1907, through an interpreter competent and duly qualified, and who did before acting as such int[illegible]preter, duly and regularly take oath that in so acting as interpreter he would tell the truth, the whole truth and nothing but the truth, so help him God, and would interpret fairly and truthfully and honestly the contents of said answer to the defendant Long Jim.

[N. P. SEAL.] FRANK H. FOSTER,
Notary Public in and for said County and State,
Residing at Brewster, Washington.

Filed Dec. 6, 1907, J. L. Campbell, Clerk, Chelan County, Wash.

9 In the Superior Court of the State of Washington in and for the County of Chelan.

R. W. STARR, Plaintiff,
v.
LONG JIM et ux., Defendants.

Reply.

Comes now the plaintiff herein and for reply to the affirmative defenses of defendants, pleaded in their answer, alleges:

1. Replying to paragraph one, admit that defendants are husband and wife, as stated, and deny each and every other allegation therein contained.

2. Replying to paragraph two plaintiff denies that Congress modified the agreement therein mentioned, and denies that the United States retained the fee and control, or either, of the land mentioned in said paragraph.

3. Replying to paragraph three plaintiff denies each and every allegation therein contained, except that he paid Long Jim $1500, and Annie $25.

4. Replying to paragraph four and five, plaintiff denies each and every allegation therein contained.

5. Replying to paragraph seven plaintiff denies each and every allegation therein contained, and denies that at said time said land was worth any greater sum than $2000.

Affirmative Reply.

For a separate, further and affirmative reply to the affirmative defense of defendants plaintiff alleges:

1. That on March 29, 1900, plaintiff purchased of and from the defendants the lands described in the complaint herein (together with others) and received general warranty deed thereto from defendants.

2. That the consideration therefor was $2000, which has
10 been wholly paid by plaintiff and received and accepted by defendants.

3. That said sum of $2000 was a fair and reasonable value for said land at said time.

4. That said defendants at said time fully understood that they were selling and conveying to plaintiff all of said lands for said consideration.

5. That they, nor either of them, have ever questioned the validity of said conveyance and sale, prior to September 7, 1907, or the fairness and good faith of plaintiff in connection therewith, and then only through the intervention of United States officials, whose names and official capacities are unknown, to plaintiff.

6. That in May of 1901 plaintiff went into actual possession

of said lands and since then and prior to September 7, 1907, had expended thereon in improving same the sum of $1000.00 and has paid taxes thereon in the sum of $175.57, at all times to the knowledge of defendants, ever claiming same as his own, to the knowledge of defendants, during all of which time defendants have never laid claim to said land or disputed the ownership of plaintiff.

7. Specifically denying that there was any fraud or bad faith in the purchase of said land plaintiff alleges that defendants have for more than six years last past known to the same extent that they now know, if they have any such knowledge, of all the fraudulent acts charged by them against plaintiff in their answer, and with such knowledge elected to ratify and confirm said sale and have ever since stood by, without questioning plaintiff's title or right, and permitted plaintiff to make valuable and permanent improvements thereon, pay taxes thereon, sell off a portion thereof and to manage and control the same as his own, and have heretofore expressly disclaimed any interest in or to said land, or any portion thereof, and by their said acts, conduct and declarations have induced plaintiff to believe that his title thereto was unquestioned by them, and has induced him to expend money thereon, as hereinbefore mentioned, and to sell a portion of said lands to third persons.

Wherefore, plaintiff prays that his title to the lands described in the complaint herein be quieted in him; that he have all relief demanded in the complaint; that he have his costs and disbursements; that he have such other and further relief as to the court may seem just and equitable in the premises.

REEVES & REEVES,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Chelan, ss:

R. W. Starr being first duly sworn on oath deposes and says that he is the plaintiff in this cause; that he has read the foregoing reply, knows the contents thereof and that the same is true as he verily believes.

R. W. STARR.

Subscribed and sworn to before me this 24th day of December, 1907.

[N. P. SEAL.] FRED REEVES,
Notary Public in and for the State of Washington, Residing at Wenatchee.

Filed Jan. 11, 1908, J. L. Campbell, Clerk, Chelan County, Wash.

In the Superior Court of the State of Washington in and for the County of Chelan.

No. —.

R. W. STARR, Plaintiff,
vs.
LONG JIM and ANNIE, His Wife, Defendants.

Decree.

The above entitled cause coming on this day regularly to be heard on defendants' motion for a judgment and decree in accordance with the decision and judgment of the Supreme Court duly entered thereon on the 9th day of March, 1901, on the appeal of said defendants to said Supreme Court from the judgment and decree of the lower court entered in said cause, and due notice of this hearing having been given, and the plaintiff being represented by his attorneys and the defendants being represented by their attorneys:

And the remittitur of the Supreme Court on said appeal having been duly and regularly received and filed in this court, and being by the court read and understood, and the court having heard the arguments of the respective attorneys on said motion and being fully advised in the premises, it is, therefore, in accordance with the judgment and opinion of the supreme court and its said remittitur filed herein ordered, adjudged and decreed

1. That the judgment of the lower court heretofore rendered and entered herein be, and the same is hereby, vacated, set aside and held for naught.

2. That the plaintiff, R. W. Starr, take nothing herein and that the lands described in the complaint, to wit, the east half of the northeast quarter and lot one (1) of section eleven (11); the southwest quarter of the southwest quarter of section twelve (12); lot 1 (1) of section fourteen (14); lot two (2) of section thirteen
13 (13), and all of lot one (1) of section thirteen (13), (except what is designated in said complaint as lot two (2), block three (3), lots seven (7), ten (10), eleven (11), and twelve (12), in block seven (7), and lots seventeen (17) and eighteen (18), in block nine (9) of Foote and Starr's Addition to Chelan, Washington), all of said premises being in township twenty-seven (27) north, of range twenty-two (22) East of Willamette Meridian and situate in Chelan County, Washington, and each and every part thereof, and the property of and owned by the defendants Long Jim and Annie, his wife, free and clear of and from all claim or claims of said plaintiff, or any one claiming through or under him, and from all cloud or clouds on the title to said lands, and particularly of and from that certain deed dated March 29, 1900, executed by the defendants Long Jim and Annie his wife, as the grantors therein to plaintiff R. W. Starr, as the grantee therein, which deed purports

to convey from the defendants to the plaintiff the lands hereinbefore described and other land, and which deed is hereby canceled, set aside and held for naught and the said defendants are entitled to the immediate possession of the lands hereinbefore described as being by them owned.

3. That said defendants do have and recover of and from the plaintiff their costs herein to be taxed.

Provided, however, and the foregoing decree is made on the condition that, the said defendants pay into court for the plaintiff the amount of the consideration paid by the plaintiff to the defendants for the deed hereinbefore described, and the attempted conveyance of the land therein described, amounting to the sum of two thousand and twenty-five ($2025.00), and interest on five hundred dollars ($500.00) from March 29, 1900, on five hundred and twenty-
14 five dollars ($525.00) from May 27, 1900, and on one thousand dollars ($1000.00) from April 6, 1901, at the rate of six per cent per annum, and the amount of such general taxes assessed against the land hereinbefore described and subsequent to August 2, 1905, as the plaintiff has paid which amount to sixty-five and sixty-eight hundredths dollars ($65.68) paid May 29, 1907, and fifty-three and ninety-eight hundredths dollars ($53.98) paid June 10, 1908, as shown by the evidence submitted at this time, with interest thereon from the date of said payments at the rate of six per cent per annum, the total amount of said principal sums and interest to be so conditionally paid to said plaintiff being thirty-two hundred and nine dollars ($3209) which shall draw interest from this date, at the rate of six per cent per annum until satisfied, provided, however, the defendants may off set against said amount so to be paid to the plaintiff the amount of all costs that may be taxed against said plaintiff herein, including Supreme Court costs, and interest thereon at the rate of six per cent per annum.

The defendants shall have sixty days after the costs are finally taxed herein within which to pay the amounts required of them to be paid as aforesaid.

Plaintiff excepts and exception allowed.

Done in open court this 12th day of June, A. D., 1909.

WM. A. GRIMSHAW, *Judge.*

STATE OF WASHINGTON,
County of Chelan, ss:

Filed June 12, 1909, and recorded in Superior Journal Vol. 3, page 336.

J. L. CAMPBELL, *Clerk,*
By —— ——, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Chelan.

R. W. STARR, Plaintiff,
v.
LONG JIM and ANNIE, His Wife, Defendants.

Statement of Facts.

This cause came on regularly for hearing on the 2d day of December, 1909, upon motion of plaintiff herein to settle and certify a statement of facts to be used on appeal of this cause, and upon the motion of defendants to strike the proposed statement of plaintiff as entered, and upon the motion of defendants to strike certain portions of plaintiff's proposed statement, and upon proposed amendments of defendant to the proposed statement of plaintiff; Reeves & Reeves appearing for plaintiff, and A. G. Avery and J. B. Lindsley for defendant, and the court having considered said matters, and having heard and considered the argument of counsel for the respective parties on said several matters, and being now fully advised in all the premises, does here and now settle the following as a statement of facts in this cause to wit:

(*a*). This cause came on regularly to be heard on June 12, 1909, on motion of defendants for decree in accordance with the remittitur of the supreme court of this state dated June 3, 1909, and filed in the office of the Clerk of this court June 5, 1909, defendants appearing by their attorneys A. G. Avery and J. B. Lindsley, and plaintiff in his own proper person and by his attorneys, Reeves & Reeves.

(*b*). The said remittitur was read and understood by the court, as was also the opinion of the Supreme Court of this State, accompanying said remittitur.

16 (*c*). Defendants did not introduce any evidence of any kind whatsoever, nor offer to produce any.

(*d*). The plaintiff showed by evidence that the amount of taxes paid by him since August 2, 1905, on the land described in the judgment and decree entered on June 12, 1909, to be as stated in said judgment and decree, to wit, one hundred nineteen and 66-100 ($119.66) dollars.

(*e*). On the hearing of said motion plaintiff took the position that the judgment directed by the supreme court of the State and the one entered by this court under said directions, was and is contrary to the Moses agreement of July 7, 1883.

(*f*). The finding of fact,—per Steiner, Judge,—made on March 31, 1908, and filed on March 31, 1908, were introduced on this hearing and considered for the purpose of passing on the matter of taxes referred to in the decree after appeal and remittitur, said findings of fact being in words and figures as follows, to wit:

"In the Superior Court of the State of Washington in and for the County of Chelan.

R. W. STARR, Plaintiff,
v.
LONG JIM and ANNIE, His Wife (Indians), Defendants.

Findings of Fact (and Conclusions of Law).

The above entitled cause coming on for hearing on the 3d day of March, 1908, and the respective parties appearing in person and by their attorneys, and the respective parties having produced evidence in said cause during the trial of the same from March 3, 1908, to March 6, 1908, inclusive, and the court having on the last named date taken the case under advisement for consideration and
17 final ruling therein, and the court having considered the cause and the evidence submitted by the respective parties, and being fully advised in all the premises, makes and adopts the following

Findings of Fact.

1. That the defendants are husband and wife and have been since March, 1886, and are full blooded Indians.

2. That defendants and each of them are citizens of the United States, and have been such since April 20, 1894, by virtue of the Act of February 8, 1887 (24 Stat. at L., 388, chap. 119).

3. That for many years prior to 1900 and during all of said year, and ever since, defendants have adopted the habits and customs of the white race, adopting their dress, mode of living and kind of habitation, and during all of said time have freely mingled with the whites, transacting business with them and taking part in celebrations, recreations and amusements.

4. That in the spring of 1900, the plaintiff purchased of the defendants the tract in dispute and other lands, and the consideration therefor was $1500, and a fee for legal services rendered by plaintiff to Long Jim, which amount of $1500, has been paid the defendant Long Jim, in gold coin, and that the said legal services were reasonably worth the sum of $500.

5. That neither of the defendants are able to read or write.

6. That the defendant, Long Jim, speaks and understands English to a considerable extent, and speaks and understands Chinook, well, and did at all times mentioned in these findings.

7. That the transaction was fully explained to the defendant, Long Jim, before he signed the deed conveying the land, by both Ben Martin who spoke Chinook well, and by the Notary who took his acknowledgment, who spoke some Chinook, and English, and that it was understood by Long Jim.

18 8. That the explanation made was that the deed conveyed all of the real property of the defendants upon which they were then residing, being all of the Long Jim allotment.

9. That at the time the deed was executed by the defendant, Long Jim, he explained the instrument to the defendant, Annie and she refused to execute it.

10. That at a later interview the instrument was explained to the defendant Annie, by Ben Martin and the Notary, Dewitt C. Britt, and by the defendant, Long Jim; that the explanations made by Martin and Britt were partly in English, partly in Chinook, and partly by signs; and that the explanations made to defendant Annie by the defendant Long Jim, was in Indian. After such explanations Annie executed the deed freely and voluntarily, she fully understanding the same.

11. That defendant Annie understands the Indian language and understands some Chinook, being able to carry on conversations in said language, and was able as aforesaid to understand the Indian and Chinook at all times mentioned in these findings.

12. That at the time Annie executed the deed there was paid her by plaintiff, the sum of $25, and the defendant Long Jim, $500.

13. That the deed was placed in the hands of Ben Martin to be held by him until the time of the final payment of $1,000, should be made, which payment was to be made one year from the date of the execution of the deed and that upon the making of the final payment of $1000, it was to be turned over to plaintiff.

14. That in April, 1901, plaintiff paid the defendant, Long Jim, $1000, the balance of the purchase price, and Ben Martin delivered the deed to plaintiff, said payment being made in gold coin in the store of Al Murdock, in Chelan, by Starr in the presence of said Murdock and M. Garton.

19 15. That immediately after the final payment of one thousand dollars to Long Jim, and the delivery of said deed to Starr by Martin, Starr caused said deed to be filed for record in the office of the Auditor of Chelan county, Washington, which said deed was on the 4th day of April, 1901, duly recorded in said office in Book 8 of Deeds, pages 363-4, and ever since has been and now is of record in said office.

16. That for many years prior to the forepart of April, 1901, the defendants lived continuously on the tract in question, and that their habitation during all of that time was on the lower or south part of said tract, and near the lake shore.

17. That the plaintiff did not at any time represent to the defendants or either of them, prior to the time defendants signed the deed mentioned in these findings, that he (plaintiff), owned the lower or south half of the tract, or any other portion of it.

18. That defendants, or either of them, did not believe that plaintiff had secured title to the lower or south half of the land in question or any part thereof, until defendants sold the land to plaintiff.

19. That soon after the first payment of $500, to the defendants in May, 1900, Long Jim purchased the possessory right to a tract of land in the Colville Indian reservation, where he now resides. That thereafter, plaintiff requested the defendants to surrender the possession of the land in question to the plaintiff, that the defendants refused to do so until the last payment was made. That this

arrangement was mutually consented to. That the last payment of $1000 was made according to agreement, in April, 1901; and that immediately thereupon the defendants delivered possession
20 of the land in question to the plaintiff, and removed to their claim, previously purchased, as aforesaid, in the Colville Indian reservation.

20. That the deed was executed by defendant, Long Jim, March 29, 1900, and the transaction was not completed nor any money paid until on or about May 27, 1900, at which time defendant, Annie, executed the deed and plaintiff paid defendant, Annie, $25, and defendant, Long Jim, $500.

21. That for many years extending over a period from 1890 to 1896 the defendants, and especially the defendant Long Jim, resisted all attempts of the Federal government to remove them from the land in question, and of divers persons to dispossess them of the same; that when plaintiff told defendant Long Jim if he did tell him as is alleged, that plaintiff had become possessed of the lower or better part of his land, defendant became angry and threatened plaintiff, that during the time from March 29, 1900, at which time it is found the deed in question was executed by defendant Long Jim, defendants had ample opportunity to learn the truth or falsity of the alleged claim of ownership of plaintiff to the south or lower half of the tract.

22. That nearly one year elapsed from the time of the execution of the deed by defendants until the time of the final payment of $1000 by plaintiff to defendant Long Jim in April, 1901, during which time defendants had ample opportunity to learn the truth or falsity of any alleged ownership by plaintiff to the lower or south half of said tract, if any such claim had been made, prior to the purchase of the tract by plaintiff, but made no effort whatever to learn the truth or falsity of such alleged misrepresentation.

23. That it is found that plaintiff did not prior to the time of the purchase of the tract for defendants, represent to said
21 defendants, or either of them, that he was the owner or had any claim to any portion of the tract, but conceding (without finding) that he did make such representation and that the same was false, I find that the defendant, Long Jim, knew of the falsity of such alleged misrepresentations about a year after the execution of the deed, at which time he had conversation with Indian Agent Anderson, concerning the matter, and was then advised that Starr did not own the land and that Long Jim had no power to sell or convey it, and said defendants nor either of them made no attempt to bring the matter to the attention of the courts until about six and one-half years thereafter, that during said six and one-half years plaintiff had sold a considerable portion of the original tract and had made valuable improvements on the balance.

24. That about a year after the execution of the deed by defendants to plaintiff, which execution is alleged by defendants was procured by false representations of plaintiff, the defendant, Long Jim, was fully aware of such fraudulent representations of the plaintiff (if any fraudulent representations were made) and at that

time (about a year after the execution of the deed), called the attention of Indian Agent Anderson, the agent in charge of the Colville Indian reservation in the State of Washington, and claiming jurisdiction over defendants, to the same. That at that time, to wit, about one year after the execution of the deed the defendant Long Jim had a conversation with Major Anderson, said Indian Agent for the Colville reservation, in which Anderson asked said Long Jim "Did Starr take the land (referring to the lower half of his allotment) away from you?" and Long Jim replied "Yes". That thought fully advised as to the alleged fraudulent transaction, neither
22 defendant Long Jim nor the United States authorities took any steps to set aside said alleged fraudulent conveyance until September 30, 1907, more than six and one-half years thereafter.

25. That plaintiff did not at any time request defendants, or either of them, to keep secret the fact of the purchase of the tract by plaintiff or any of the conversations prior to or at the time of the said sale.

26. That the fact that plaintiff had purchased said tract was generally known in Chelan and vicinity within a short time after said purchase was made in 1900, not later than the early summer of said year.

27. That for several years prior to 1900 and also during all of said year, defendant Long Jim was continuously associating with white men in Chelan and vicinity, and transacting business with them much the same as the average white settler did, and that during all of said time he was possessed of intelligence equal to or greater than the average white man, and was abundantly able to protect himself in all business transactions.

28. That on or about July 4, 1902, defendant Long Jim, had a conversation with one O. A. Hoag, in which he told the said Hoag, his attention being called to the land on which there was then a race track, and which race track was a portion of the lower or south half of the tract in dispute, that he, (defendant Long Jim), had sold the land embraced by the race track to plaintiff.

29. That at the time of the commencement of this action the summons and complaint herein were personally served on the said defendants, whereupon Long Jim the defendant entered into a conversation with D. L. Gillespie for the purpose of learning the contents of the complaint and the nature of the action, and he
23 at that time told said Gillespie that he had sold the land to plaintiff; that he, Jim, had no claim or interest in the land, being the land mentioned in the complaint, because he had sold it to Starr, but that if the United States wanted to get the land back for him it would be all right.

30. That from the time Long Jim signed the deed to Starr until Annie signed same, said deed was in possession of Britt, the notary public who took the acknowledgment, and that the deed introduced in evidence and marked plaintiff's exhibit B is the identical deed signed by both Long Jim and Annie.

31. That before July 4, 1902, defendants had become aware of the falsity of the alleged false misrepresentations of plaintiff (if

any such false representations had been made); that on or before July 4, 1902, defendant Long Jim had a conversation with O. A. Hoag in which he, Long Jim, alleged that he told said Hoag that he, Long Jim, owned the land on which the race track was then situated which was on the lower or south half of said tract. That defendants having such knowledge took no steps to set aside the deed alleged to be fraudulently procured until September 30, 1907,—over five years thereafter.

32. That during the year 1902, Starr attempted to secure from Long Jim a relinquishment of Long Jim's right to the lands described in the patent herein mentioned. At this interview one Bob Blakeny acted as interpreter. Starr offered Jim $500 for a relinquishment. Jim refused it, and then stated Starr had stolen the land. This was after Jim's conversations with Major Anderson, mentioned in these findings. Starr's purpose was to secure a relinquishment for the purpose of filing with the Interior Department and getting its approval thereof in order that Starr could secure title in some other manner.

24 33. After the patent mentioned herein had been issued, Starr through one D. L. Gillespie, offered Long Jim one thousand ($1000) dollars for possession of the patent. His object in this was to have the patent recorded in the office of the auditor of Chelan County, in order to make his title marketable. Jim refused this offer, and in making said refusal he was acting under direction of the Colville Indian reservation agent.

34. That since April, 1901, and prior to the appearance of defendants in this action, plaintiff expended the sum of seven hundred dollars in improving said lands, and has paid taxes thereon in the sum of $150.

35. That prior to the commencement of this action plaintiff sold and conveyed by warranty deed to divers persons all the land described in these findings and not described in the complaint herein.

36. That at the time Starr purchased said land from defendants its fair and reasonable market value was not to exceed $2000.

37. That the fair and reasonable market value of said land at the time defendants made their appearance in this action, was the sum of $25,000, said appearance having been made September 30, 1907.

38. That the increase in value of said land is due to the growth and development of Chelan and surrounding country, and to the general progress and prosperity obtaining therein since 1900, and bears about the same ratio as other property similarly situated, and to improvements made on said land.

39. That some sales have been made in 1907, by plaintiff of acre tracts out of the tract in question, for as high as six hundred ($600) dollars per acre, which price is coupled with an agreement on the part of plaintiff to put water on the tracts so sold.

25 40. That on or about the 20th day of April, 1894, the Secretary acting under the provisions of the Act of Congress of July 4, 1884 (28 Stat. 79-80), ratifying and confirming the Moses agreement of July 7, 1883, made an allotment to defendant, Long

Jim, granting in fee to him the lands mentioned in the complaint and other lands.

41. That on the 2d day of August, 1905, acting under an Act of Congress, approved March 3, 1905, (33 Stat. p. 1084-5), the President of the United States issued to defendant Long Jim a patent in fee to the lands mentioned in the complaint and other lands.

42. That plaintiff is now and has been continuously since April, 1901, in the actual possession of the lands mentioned in the complaint, and entitled to said possession.

43. That the lands mentioned in the complaint are the east half of the north east quarter, and lot 1 in section 11; the southwest quarter of the southwest quarter of section 12; lot 1 in section 14; lot 2 in section 13; and all of lot 1 in section 13; except lot 2 in block 3, lots 7, 10, 11, and 12, in block 7, and lots 17 and 18 in block 9 of Foote and Starr's addition to Chelan, Washington, all being in township 27 north, of range 22, E. W. M., in Chelan County, Washington.

44. That the lands mentioned in the allotment to defendant Long Jim, the patent to the defendant Long Jim and the deed from defendants Long Jim and Annie his wife, to plaintiff are the northeast quarter of the northeast quarter of the southeast quarter and lot 1 of section 11; the northwest quarter and the southwest quarter of the southwest quarter of section 12; lot 1 in section 14, and lots 1
and 2 in section 13, township 27 north, range 22, E. W. M.,
26 which include the lands mentioned in the complaint and other lands, and all of which said lands are in Chelan county, Washington.

Done in open court this 31" day of March, 1908.

R. S. STEINER, *Judge.*"

27 Now, therefore, I, William A. Grimshaw, Judge of the above entitled court and before whom this cause was tried, do hereby certify that the foregoing statement of facts are matters and proceedings occurring in this cause, and that they are hereby made a part of the record herein; and

I further certify, that said statement of Facts contains all the material facts, matters and proceedings occurring in this cause and not already a part of the record herein, and that the same is hereby settled and certified as a statement of facts in this cause.

Done in open court this 2d day of December, 1909.

WM. A. GRIMSHAW, *Judge.*

Endorsed: 8512. R. W. Starr, Plaintiff, vs. Long Jim et ux., Defendant. Statement of Facts. Filed Dec. 3, 1909. J. L. Campbell, Clerk, Chelan County, Wash. Filed Dec. 21, 1909. C. S. Reinhart, Clerk.

28

No. 7863.

R. W. STARR, Respondent,
vs.
LONG JIM and ANNIE, His Wife, Appellants.

Filed Mar. 9, 1909.

On the 7th day of July, 1883, the Secretary of the Interior and the Commissioner of Indian Affairs on the part of the United States, and chief Moses and other Indians of the Columbia and Colville reservations in the then Territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte creek to accom-odate one hundred (100) pupils, and physician to reside with them, and $100 (one hundred) to himself each year.

"Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000.00) for the purpose of erecting a dwelling house for himself; also to construct a saw mill and grist mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

29 "And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition

to all of the above, one thousand dollars ($1,000.00) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; that until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police — over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move onto the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to acomplish the foregoing and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians heretofore mentioned, shall not be required to remove to the Colville reservation until Congress does make such appropriation, etc."

This agreement was ratified and confirmed by the Act of Congress of July 4, 1884, 23 United States Statutes at Large, 79-80, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dolars, or so much thereof as may be required therefor, to be immediately available: Provided, that Sar-sarp-kin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated, or remove to the Colville reservation: and provided, further, that in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the

homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

30 On the 11th day of August, 1894, in conformity to this agreement and the Act of Congress ratifying the same, the Secretary of the Interior set apart for the exclusive use and occupation of the defendant Long Jim a certain allotment on the Columbia reservation, a part of which is involved in this action. The Act of Congress of March 3, 1905, 33 U. S. Statutes at Large, p. 1064-5 authorized the Secretary of the Interior to issue a patent to the defendant Long Jim for the land embraced in his allotment in the following language:

"That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and ninety-four, under and by virtue of the agreement concluded July seventh, eighteen — and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the 'Moses agreement,' accepted, ratified, and confirmed by the Act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to wit: the northeast quarter, northeast quarter of the southeast quarter and lot one of section eleven, the northwest quarter and southwest quarter of the southwest quarter of section twelve, lot one section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, incumbrance, or taxation."

On August 2, 1905, a patent was issued pursuant to the authority granted by the last mentioned act. On March 29, 1900, the defendants conveyed a portion of their allotment to the plaintiff in this action by warranty deed in consideration of the sum of $2,000. The plaintiff entered into possession of the granted premises about a year after the execution of the deed, and has continued in possession ever since. This action was instituted for the purpose of quieting his title to the land described in his deed as against the claims and demands of the defendants. A judgment by default was taken against the defendants for failure to answer, but the default was afterwards opened, on motion of the defendants appearing through the

31 United States attorney for the Eastern District of Washington, and the defendants were permitted to answer and defend, on condition that they pay $75.00 as costs, and that the cause be heard and determined in the state courts, which conditions were assented to and complied with. The answer of the defendants attacked

the validity of the deed under which the plaintiff claims on the ground of fraud in its procurement, and on the further ground that the deed was void in its inception, because at the date of its execution the title to the land therein described was in the United States, and the defendants had no right, power or authority to convey the same. The court below made findings of fact and conclusions of law in favor of the plaintiff and gave judgment accordingly. From that judgment the defendants have appealed.

In view of the conclusion we have reached on certain legal questions involved in the case we deem it unnecessary to enter upon a discussion of the facts. At the time the conveyance under which the respondent claims title was executed the United States held the title to the land sought to be conveyed in trust for the Indian appellants, and had stipulated in the Moses agreement and the act of Congress confirming the same that the Indians should be guaranteed and protected in the possession and ownership thereof. How could the government guarantee and protect the Indians in the possession and ownership of the property if the Indians were at liberty to divest themselves of that ownership and possession through a voluntary conveyance? The nature of the Indian claim to these allotted lands was fully considered by the United States Circuit Court of Appeals for this Circuit in the case of United States v. Moore, 161 Fed. 510. It was there held that the Indian acquired a mere right of possession through the allotment, that the legal title remained in the United States until after patent, and that the United States could maintain an action of ejectment against a third person who had ousted the Indian allottee from possession. In the course of its opinion the court said:

32 "Looking at the agreement alone, we do not think that either party to it could have understood from its language that it was contemplated that the government was to sever its relations to such of the Indians as should remain on the Columbia reservation, any more than with those who should remove to the Colville reservation—to cease to be their guardian. On the contrary, the agreement expresely recites that the Indians were to be 'protected' by the government and by it guaranteed in the possession and ownership of the respective tracts of land to be set apart to them in severalty. How could the United States afford such protection but by remaining the guardian of the Indians? We think it the plain meaning of the agreement itself that it should do so, and that no party thereto could have otherwise understood. That it was to the interest of the Indians that the government should retain such title and continue as the guardian of the Indians was recognized by the learned judge of the court below, where he said in his opinion that his conclusion had 'been reached with much reluctance, for no doubt it would be better for the Indians to sustain the plaintiff's contention. They are not qualified to cope with the white race, and the result of this decision, should it be sustained in the higher courts will no doubt be prejudicial to their best interests. It is to be regretted that so commendable an effort should not have been made before the agreement received the approval of Congress, or at least before the rights

of purchasers had attached; but the Supreme Court has said that the courts are not concerned with these considerations.'

"That Congress took the same view in respect to the interest of the Indians is, we think, manifest from its confirmatory act in question, in which it provided that, should the Indians then residing on the Columbia reservation elect within the time limited in the statute (one year) to remain on that reservation, the Secretary of the Interior should cause the quantity of land, stipulated in the agreement to be allowed them, to be selected in as compact form as possible, 'the same when so selected to be held for the exclusive use and occupation of said Indians.' To be 'held' by whom? Obviously by the United States, their guardian, and to the end that they might be 'protected' against the tricks and acts of designing persons. Such act on the part of Congress was in accord with its general policy upon the subject; and that such is its true meaning finds strong support in the fact that the act was so construed by President Cleveland in his executive order of May 1, 1886, directing:

"That the tracts of land in Washington Territory surveyed for and allotted to Sar-sarp-kin and other Indians, in accordance with the provisions of said act of July 4, 1884, which allotments were approved by Acting Secretary of the Interior April 12, 1886, be, and the same are hereby set apart for the exclusive use and occupation of said Indians; the field notes of the survey of said allotments being as follows," etc.

"It is further confirmed by the interpretation put by Congress itself upon the act of July 4, 1884, by its subsequent acts of March 3, 1905 (33 Stat. 1064, c. 1479), and of March 8, 1906 (34 Stat. 55, c. 629), providing for the conveyance of the government title by patents to certain of the allottees under the agreement and act in question. The legislative construction of its own act is always potent. 'If it can be gathered,' said the Supreme Court in U. S. v. Freeman, 3 How. 556-564, 11 L. Ed. 724, 'from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.' And in the case of Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. 20, the Supreme Court of Pennsylvania said:

'If a contemporaneous construction by the Legislature of
33 the same words can be discovered, it is high evidence of the sense intended.'

That the acts of July 4, 1884, of March 3, 1905, and of March 8, 1906, above referred to, are in pari materia, is perfectly plain, for they relate to the same subject-matter and are parts of the same legislative purpose. In respect to such statutes, Sutherland, St. Const. 283, says:

'All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together, as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different dates, separated by long or short intervals at the same

session, or on the same day. They are all to be compared, harmonized, if possible, and, if not susceptible to a construction which will make all of their provisions harmonize, they are made to operate together, so far as possible, consistently with the evident intent of the legislative enactment.'

And in Endlich on the Interpretation of Statutes, Sec. 43, it is said:

'Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it belongs.'"

This language is utterly inconsistent with any right or authority in the Indian allottee to convey the land or divest himself of the ownership and possession before patent. The Moses agreement and the several acts of Congress relating to these Indian lands being in pari materia must be construed together, and it may well be asked why did Congres provide, five years after the conveyance under which the respondent claims, that the government patent should be free from all restrictions as to sale, encumbrance or taxation if no such restrictions had existed prior to that time. It seems to us that there can be no question that the Moses agreement and these several acts of Congress clearly evince the long established policy of the government to retain a guardianship over these Indians and to hold their lands in trust for them, to protect them against their ignorance and improvidence and "against the tricks and acts of designing persons." If so, the attempt on the part of the appellants to dispose of their allotment and the attempt on the part of the respondent to
84 acquire the title were alike violative of the spirit and purpose of the laws of the United States, and it is the duty of every court to declare such conveyances null and void.

Cory v. Law, 36 Wash. 10;
Melchoir v. McCarty, 31 Wis. 251;
Smith v. Stevens, 10 Wallace, 321.

If the deed was void in its inception because in contravention of the laws of the United States, it was void for all purposes and cannot convey an after acquired title. As said by the court in Atkinson v. Bell, 18 Texas, 474, "The rule that where a vendor has not title, and sells, any title afterwards procured by him will inure to the benefit of the purchaser, does not apply in cases where such sale was prohibited by law. Such favor shown to a purchaser at a prohibited sale would thwart and defeat the policy of the government." See, also, Holmes v. Johns, 56 Texas, 41; Bank of America v. Banks, 101 U. S. 240. Something is said in the briefs about the question of laches, but there is nothing in this record to bar the appellants from asserting their title to these lands at any time within the period prescribed by the statute of limitations. The respondent contends that the court abused its discretion in opening the default and admitting the appellants to defend, and in support of this contention we are referred to the following statement em-

bodied in the certificate to the statement of facts: "And the court further certifies at the request of the plaintiff and over the objection of defendants, exceptions to which are allowed defendants, that in the consideration and decision of the motion of defendants to vacate the original judgment, that I was convinced from the affidavits used and the showing made on said motion that there was no excuse for the defendants not appearing and defending in time or for their long delay in moving against the default thereafter, but was of the opinion that notwithstanding this, it would be a
35 proper matter to investigate the allegations of fraud mentioned in defendant's motion to set aside said judgment." Why should the question of fraud be investigated if the investigation could not be made effective by the rendition of a final judgment? We think the court below acted well within its discretion in setting aside the default and permitting the appellants to answer, and it should not be permitted to impeach or undermine its previous ruling by a statement inserted in its certificate to the statement of facts months afterwards.

It only remains to consider the form of judgment to be entered after the remand of the case to the court below. The prayer for relief in the answer is as follows:

"Wherefore, these defendants pray for a judgment and decree herein that the plaintiff take nothing; that the above described lands, and each and every part thereof, are the property of, and owned by the defendants, free and clear of, and from all claims, or claims of said plaintiff, or any one claiming through or under him, and that all cloud, or clouds on said defendant's title may be removed and cleared; provided however, that before such decree shall become of full force and effect, the defendants shall pay into Court for said plaintiff the sum of Fifteen Hundred and Twenty-five dollars ($1525.00) with legal interest thereon from the day on which said sum was paid by the plaintiff to said defendants, as stated in the complaint.

That if it should be determined in said action that said plaintiff had collected or secured any money or other article, or property of value for the sale, use or lease of said real estate, or any part thereof, that these defendants have judgment against the plaintiff for the amount thereof with legal interest thereon, against which judgment the aforesaid sum of Fifteen Hundred and Twenty-five dollars ($1525.00) and interest may be proportionately and properly an offset."

We think that judgment for the appellants should go as prayed except in two particulars. If the respondent has paid any taxes levied after the land became legally subject to taxation these should be included in the amount to be paid by the appellants with legal interest, and we think in equity the attorney fee of $500 which constituted a part of the consideration for the deed should likewise be included, with interest. The record shows that this attorney fee was justly due and owing to the respondent at the time the deed was executed; the respondent has relied upon the conveyance as a
36 satisfaction of his claim and has taken no steps to otherwise enforce it; the claim is now barred by the statute of limita-

tions and the respondent is remediless, unless this court interposes in his behalf, and we think that equity and good conscience require that we should do so. With this modification the judgment is reversed with directions to enter judgment in favor of the appellants according to the prayer of their answer.

RUDKIN, *C. J.*

We concur:
GOSE, *J.*
FULLERTON, *J.*
CROW, *J.*
CHADWICK, *J.*
MOUNT, *J.*
DUNBAR, *J.*

37 Filed June 27th, 1910.

No. 8512.

Department One.

R. W. STARR, Appellant,
v.
LONG JIM and ANNIE, His Wife, Respondents.

Per Curiam:

On a former appeal of this case the judgment was reversed and the cause remanded to the court below with directions to enter judgment in favor of the defendants in accordance with the prayer of their answer, upon the payment of certain sums to be ascertained and fixed by that court. Starr v. Long Jim, 52 Wash. 138. A further hearing was had after the cause was remanded, and a second and final judgment was entered in accordance with the mandate of this court. From the latter judgment this appeal is prosecuted.

No error is assigned upon any ruling or decision of the court on the second hearing, and we have neither the right nor the disposition to reconsider the questions determined here on the former appeal.

The judgment is therefore affirmed.

38 In the Supreme Court of the State of Washington.

No. 8512.

R. W. STARR, Appellant,
v.
LONG JIM et al., Respondents.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Chelan county

and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises it is now on this 28th day of July, A. D. 1910, considered, adjudged and decreed that the appeal from the judgment of the said superior court be and the same is hereby affirmed. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

39 In the Supreme Court of the State of Washington.

R. W. STARR, Plaintiff and Respondent,

vs.

LONG JIM and ANNIE, His Wife, Defendants and Appellants.

Petition for Writ of Error.

To the Honorable F. H. Rudkin, Chief Justice of the Supreme Court of the State of Washington:

The Petition of R. W. Starr shows:

1.

That heretofore and on March — 1908, there was tried in the Superior Court of the State of Washington for Chelan County a cause in which R. W. Starr was plaintiff and Long Jim and Annie, his wife, were defendants, and after a hearing of said cause on the merits, without a jury, findings of fact, and conclusions of law were made and signed and filed in plaintiff's favor and decree thereon entered in plaintiff's favor.

2.

Plaintiff's complaint in said cause allaged he was the owner in fee simple, in possession of and entitled to possession of certain lands situate in Chelan county, Washington, being particularly described in said complaint as follows, to wit:

The east half of the northeast quarter of lot one (1) of section eleven (11); the southwest quarter of the southwest quarter of section twelve (12); lot one of section fourteen; lot two (2) of section thirteen, and all of lot one (1) of section thirteen (13) (except what is designated in said complaint as lot two (2), block three (3), lots seven (7), ten (10), eleven (11), and twelve (12) in block seven (7), and lots seventeen (17) and eighteen (18), in block nine (9) of Foote and Starr's Addition to Chelan, Washington,) all of said premises being in township twenty seven (27) north, of range twenty two (22) east of Willamette Meridian and situate in Chelan county, Washington.

40 3.

Defendants' answer in said cause alleged that defendants were Indians; that the lands described in plaintiff's complaint were included in allotment No. —, same being allot-ed to Long Jim in

1894 by the Secretary of the Interior under and by virtue of the Moses agreement of July 7, 1883, and the Act of Congress of July 4, 1884, (23 Stat. 79-80) ratifying and confirming same; that Starr claimed said land under a deed made March 29, 1900 by Long Jim and Annie purporting to convey said lands to said Starr; that Long Jim was induced to sign said deed through Starr's fraud; that Annie never did sign it; that at the time said deed was made the United States was possessed of the fee thereof; that Long Jim and Annie had no power to convey same; that they were prohibited from so doing by said agreement and said act of Congress, and that no title passed by said deed.

4.

Plaintiff's reply to said answer denied all allegations of fraud; admitted that the land in question was allotted to Long Jim under the provisions of said Moses agreement and said act of Congress, and affirmatively set up that said allotment under said Moses agreement and said act of Congress passed title in fee to Long Jim, and that his and his wife's deed to Starr passed title in fee to Starr. The trial court so found and decreed.

5.

Starr further averred by his reply that on August 2, 1905, the United States issued a fee simple, unrestricted patent to said lands to Long Jim, and that title thus gained inured to his, Starr's benefit. The trial court further found that if the title was not in Long Jim and his wife at the time they conveyed to Starr, the after acquired title which passed to them by fee simple patent without restrictions, inured to Starr's benefit.

41 6.

As hereinbefore stated, the trial court found all the issues of both law and fact in favor of Starr, and Specially found that the allotment to Long Jim under the said Moses agreement and the said act of Congress in ratification thereof passed a title in fee thereto to Long Jim and that he had full power to convey said land to Starr, and that the said deed from Long Jim and Annie did pass title in fee to Starr to said lands, sand decree was entered accordingly.

7.

That by reason of said pleadings on the part of both plaintiff and defendants the court was called upon to decide, and did decide the Federal question of whether or not under and by virtue of the said Moses agreement and the said Act of Congress in ratification thereof the said allotment of said land, as aforesaid, conferred power on the allottee to convey same, and in said trial Starr specially set up his right to said land under said Moses agreement and the said act of Congress in ratification thereof, and this claim was sustained by the trial court; and under the uniform holdings of this court evidence of Starr's title through Long Jim, under and by virtue of

said Moses agreement and said act of Congress was and is admissible under the allegations of Starr's said complaint.

8.

Thereafter and in due time Long Jim and Annie appealed from said decree to the Supreme Court of the State of Washington, wherein the same Federal questions as aforesaid were decided, said decision reversing the decree of the lower court, and specifically denying the claim specially set up by Starr under an agreement and law of the United States, to wit; that under and by virtue of said Moses agreement and the said act of Congress in ratification thereof the said allotment by the United States of said lands to Long Jim vested
42 in him, Long Jim, a title in fee simple, giving him full right and power to convey the same, and that therefore the aforesaid deed from Long Jim and Annie, his wife, to Starr, passed a good title in fee to Starr; that this court further decided that the said deed made and executed to Starr by Long Jim and Annie, his wife, March 29, 1900, was not sufficient to pass the title acquired by them on August 2, 1905, as heretofore recited, for the reason that by virtue of the operation of the United States laws they had no power to convey; that conveyance is prohibited by said Moses agreement and said act of Congress in ratification thereof, and that therefore no after acquired title of Long Jim could pass to Starr.

9.

This court also decided that Starr should account to Long Jim for any money Starr had received for any land sold to third persons out of any portion of said allotment, which is in effect giving Long Jim the land and requiring Starr to pay him for it at the same time; this your petitioner claims to be depriving him of his property without due process of law, in contravention of the Constitution of the United States.

10.

After Starr's petition for rehearing was denied by this court, and on June 5, 1909, remittitur from this court was duly filed in the office of the clerk of said superior court, directing said superior court to set aside its said decree, and entered one for Long Jim and Annie in accordance with the opinion of this court.

11.

On the 12th day of June, 1909, the cause came on to be heard in the superior court in accordance with the remittitur and the opinion of the Supreme Court of the State of Washington, at which hearing defendants did not offer any evidence to show the amount plaintiffs had received for portions of the tract sold; the
43 plaintiff introduced evidence to show the amount of taxes paid by him on the tract involved.

12.

After hearing the cause the Court made findings of fact in accordance with the evidence introduced by plaintiff and made decree; the findings of fact made by the Superior Judge in the former hearing of the case were introduced and incorporated into the findings made.

13.

Thereafter and in due time plaintiff appealed to the Supreme Court of the State of Washington and said Supreme Court sustained the second and final judgment made by the court below.

Wherefore, your petitioner herewith presents an exemplified transcript of the record of the Supreme Court of the State of Washington in said cause and prays that a writ of error from the Supreme Court of the United States to the said Supreme Court of the state of Washington be allowed; that citation be granted and signed and that the bond presented herewith be approved, to the end that the errors complained may be reviewed in the Supreme Court of the United States and the judgment aforesaid of the Supreme Court of the State of Washington be reversed.

R. W. STARR, *Petitioner.*
FRANK REEVES,
FRED REEVES, AND
R. W. STARR,
Attorneys for Petitioner.

Endorsed: No. 8512. Long Jim and Annie, his wife, Appellants, vs. R. W. Starr, Respondent. Petition for Writ of Error. Filed Aug. 8, 1910. C. S. Reinhart, Clerk.

44 In the Supreme Court of the State of Washington.

R. W. STARR, Plaintiff in Error,
vs.
LONG JIM and ANNIE, His Wife, Defendants in Error.

Assignment of Errors.

Comes now the plaintiff in error in this action — in connection with and as a part of his petition for a writ of error filed herein, makes the following assignment of errors.

1. That the Supreme Court of the State of Washington erred in holding that the Moses agreement of July 7, 1883, accepted, ratified and confirmed by Act of Congress July 4, 1884, did not pass title in fee to Long Jim for the tract of land set apart and allotted to him August 11, 1894, in conformity with said agreement and Act.

2. That the Court erred in holding that "At the time the conveyance under which respondent claims title to the land was executed the United States held the title to the land sought to be conveyed in trust for the Indian appellants."

3. That the Court erred in holding that defendants in error were prohibited by law from conveying any title that they may have had at the time they made the conveyance of March 29, 1900.

4. That the court erred in holding that the warranty deed of defendants in error, made and executed to respondent, March 29, 1900, did not pass the after acquired title of defendant in error by virtue of patent issued August 2, 1905.

5. That the Court erred in holding that the deed executed March 29, 1900, by defendants in error to plaintiff in error was void.

6. That the court erred in holding that there is nothing in the record upon which to base an estoppel.

45 7. That the Court erred in holding that "there is nothing in this record to bar the appellants from asserting their title to these lands at any time within the period prescribed by the statute of limitations."

FRANK REEVES,
FRED REEVES, AND
R. W. STARR,
Attorneys for Plaintiffs in Error.

Endorsed: No. 8512. Long Jim and Annie, his wife, Appellants, vs. R. W. Starr, Respondent. Assignment of Errors. Filed Aug. 6, 1910. C. S. Reinhart, Clerk.

46 In the Supreme Court of the State of Washington.

R. W. STARR, Plaintiff in Error,
vs.
LONG JIM and ANNIE, His Wife, Defendants in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and upon examination of said petition and the record in the matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved, the bond to act as a supersedeas.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Dated at Olympia, Wash., this 6th day of August 1910.

Endorsed: No. 8512. Long Jim and Annie, his wife, Appellant, vs. R. W. Starr, Respondent. Order Allowing Writ of error. Filed August 6, 1910. C. S. Reinhart, Clerk.

47 In the Supreme Court of the State of Washington.

R. W. STARR, Plaintiff in Error,
vs.
LONG JIM and ANNIE, His Wife, Defendants in Error.

Know all men by these presents that we, R. W. Starr, as principal and C. A. Doty and J. E. Frost, as sureties, are held and firmly bound unto Long Jim and Annie, his wife, in the sum of Three Thousand Dollars, to be paid to the said obligees, their successors, representatives, and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of August, A. D. 1910.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Washington.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then, this obligation to be void, otherwise to remain in full force and effect.

R. W. STARR, *Principal.*
C. A. DOTY,
J. E. FROST,
Sureties.

48 STATE OF WASHINGTON,
County of Lewis, ss:

On this 6th day of August, 1910, before me, a Notary Public in and for the State of Washington, personally appeared R. W. Starr, who as principal and C. A. Doty and —— ——, who, as sureties, executed the foregoing bond, known to me to be the persons described in and who executed the same, and each severally acknowledged that he executed the same as his free act and deed.

[NOTARY SEAL.] G. B. MASON,
Notary Public in and for the State of Washington, Residing at Centralia.

STATE OF WASHINGTON,
County of Thurston, ss:

On this 6 day of August, 1910, before me, a Notary Public, in and for the State of Washington, personally appeared J. E. Frost, one of the sureties in the foregoing bond, known to me to be the person described in and who executed the same as surety, and acknowledged that he executed the same as his free act and deed.

[NOTARY SEAL.] C. WILL SHAFFER,
Notary Public, Residing at Olympia, Wash.

STATE OF WASHINGTON,
County of Lewis, ss:

C. A. Doty and —— —— being each first duly sworn on oath says, each for himself, that he is a resident of the state of Washington; that he is worth, over and above all debts and liabilities, in property within the State of Washington, the sum of Six Thousand Dollars.

C. A. DOTY.
—— ——.

49 Subscribed and sworn to before me this 6th day of August, 1910.

G. B. MASON,
Notary Public, Residing at Centralia, Washington.

STATE OF WASHINGTON,
County of Thurston, ss:

J. E. Frost being duly sworn on oath says that he is a resident of the State of Washington; that he is worth over and above all liabilities, in property within the State of Washington, the sum of Six Thousand Dollars.

J. E. FROST.

Subscribed and sworn to before me this 6th day of August, 1910.
C. WILL SHAFFER,
Notary Public, Residing at Olympia, Wash.

The foregoing bond approved this 6th day of August, 1910.
FRANK H. RUDKIN,
Chief Justice.

Endorsed: No. 8512. Long Jim and Annie, his wife, Appellants, vs. R. W. Starr, Respondent. Bond. Filed Aug. 8, 1910, C. S. Reinhart, Clerk.

50 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest Court of the said state in which a decision could be had in the said suit between R. W. Starr and Long Jim and Annie, his wife, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision

was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemptions specially set up or claimed under such clause of the Constitution, treaty, statute, or commission, a manifest error has happened, to the great damage of the said R. W. Starr, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of October, 1910, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which
51 of right and according to the laws and customs of the United States should be done.

Witness the Honorable John J. Harlan, Senior Associate Justice of the said Supreme Court, the 8th day of August, in the year of our Lord, 1910.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington.
By SAM'L D. BROGES,
Deputy Clerk.

Allowed by
FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

[Endorsed:] No. 8512. In the Supreme Court of the State of Washington. Long Jim and Annie, his wife, Appellants, vs. R. W. Starr. Respondent. Writ of Error. Filed Aug. 8, 1910. C. S. Reinhart, Clerk. Reeves & Reeves, Wenatchee, Wash., Attorneys for Respondent.

52 UNITED STATES OF AMERICA, ss:

To Long Jim and Annie, his wife:

You are cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office

of the Supreme Court of the State of Washington, wherein R. W. Starr is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

[Seal of the Supreme Court, State of Washington.]

Attest Aug. 8, 1910.
C. S. REINHART,
Clerk Supreme Court, State of Washington.

Service of Copy of the foregoing citation acknowledged this 27 day of August, 1910.

A. G. AVERY,
Attorneys for Long Jim and Annie, His Wife.

[Endorsed:] No. 8512. In the Supreme Court of the State of Washington for Chelan County. R. W. Starr, Plaintiff in Error, vs. Long Jim & Annie his wife, Defendants in Error. Citation. Filed Sep. 2, 1910. C. S. Reinhart, Clerk. Reeves & Reeves, Wenatchee, Wash., Attorneys for P.

53 In the Supreme Court of the State of Washington.

R. W. STARR, Plaintiff in Error,
v.
LONG JIM and ANNIE, His Wife, Defendants in Error.

Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of so much of the record in the above entitled cause as I have been directed in the precipe of the plaintiff in error to transmit to the Supreme Court of the United States, together with the original writ of error and original citation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court this 10th day of October, 1910.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 22,358. Washington Supreme Court. Term No. 151. R. W. Starr, plaintiff in error, vs. Long Jim and Annie, his wife. Filed October 18th, 1910. File No. 22,358.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 151

R. W. STARR, PLAINTIFF IN ERROR,

vs.

LONG JIM AND ANNIE, HIS WIFE, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Washington

BRIEF OF PLAINTIFF IN ERROR.

FRANK REEVES *and*
R. W. STARR,
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

(Plaintiff in error was plaintiff in the trial court; he will be designated as plaintiff in this brief. Defendants in error will be referred to as defendants. Transcript of record will be abbreviated to Rec. References to it are to top paging.)

The facts involving Federal questions are stated by the Supreme Court of the State of Washington (Rec. 17-21; 52 Wash. 138) as follows:

"On the 7th day of July, 1883, the Secretary of the Interior and the Commissioner of Indian Affairs on the part of the United States, and Chief Moses and other Indians of

the Columbia and Colville reservations in the then Territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantialy what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and physician to reside with them, and $100 (one hundred) to himself each year.

"Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove on to the Colvile reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand ($1,000.00) dollars for the purpose of erecting a dwelling house for himself; also to construct a saw mill and grist mill as soon as the same shall be required for use; also that each head of a family or each male adult shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addi-

tion to all of the above, one thousand dollars ($1,000.00) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colvile reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; that until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile of land, to each head of a family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move on to the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing and confirm this agreement, and, also, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville reservation until Congress does make such appropriation, etc."

This agreement was ratified and confirmed by the Act of Congress of July 4, 1884, 23 United States Statutes at Large, 79-80, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which

agreement is hereby accepted, ratified and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, that Sar-sarp-kin and the Indians now residing on the Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated, or remove to the Colville reservation; *and provided further*, That in case said Indians so elect to remain on said Columbia reservation, the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands.

"On the 11th day of August, 1894, in conformity to this agreement and the Act of Congress ratifying the same, the Secretary of the Interior set apart for the exclusive use and occupation of the defendant Long Jim a certain allotment on the Columbia reservation, a part of which is involved in this action. The Act of Congress of March 3, 1905, 33 U. S. Stat. at Large, p. 1064-5, authorized the Secretary of the Interior to issue a patent to the defendant Long Jim for the land embraced in his allotment the following language:

"'That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and ninety-four, under and by virtue of the agreement concluded July seventh, eighteen—and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the 'Moses agreement,' accepted, ratified and confirmed by the Act of Congress ap-

proved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to-wit: the northeast quarter; northeast quarter of the southeast quarter and lot one of section eleven; the northwest quarter and southwest quarter of the southwest quarter of section twelve; lot one section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, incumbrance, or taxation.'

"On August 2, 1905, a patent was issued pursuant to the authority granted by the last mentioned act. On March 29, 1900, the defendants conveyed a portion of their allotment to the plaintiff in this action by warranty deed in consideration of the sum of $2,000. The plaintiff entered into possession of the granted premises about a year after the execution of the deed, and has continued in possession ever since. This action was instituted for the purpose of quieting his title to the land describe in his deed as against the claims and demands of the defendants. * * * * * * *

"The court below made findings of fact and conclusions of law in favor of the plaintiff and gave judgment accordingly. From that judgment the defendants have appealed."

The Fortieth Finding of Fact (Rec. 15-16) is as follows: "40. That on or about the 20th day of April, 1894, the Secretary acting under the provisions of the Act of Congress of July 4, 1884, (23 Stat. 79-80), ratifying and confirming the Moses Agreement of July 7, 1883, made an allotment to the defendant, Long Jim, granting in fee to him the lands mentioned in the complaint, and other lands."

The Supreme Court of the State of Washington refused to disturb the findings of fact made by the trial court, but reversed its decree solely on the ground that the Moses Agreement and the Act of Congress ratifying it passed no title to the allotted lands, and holding under its terms the United States held the lands in trust for Long Jim, and that the patent issued to Long Jim after his deed to Starr did not have the effect of conveying the after acquired title.

Upon reversing the decree of the trial court the Supreme Court remanded the cause, directing the trial court to ascertain the amount of taxes plaintiff had paid on the land since the issuance of patent, and after adding said sums to be so ascertained to other payments made by plaintiff to defendants, a judgment should be entered in favor of defendants, awarding them the land. Upon remand a further hearing was had at which plaintiff introduced evidence showing the amount of taxes so paid, (Rec. 10 par. d), whereupon final decree was entered in favor of the defendants. (Rec. 12). Plaintiff then appealed to the Supreme Court of the State of Washington, where said final decree was affirmed.

(Rec. 24, *Starr vs. Long Jim*, 59 Wash. 190).

Plaintiff brings the case here on writ of error.

The questions involved here are:

1. Did the Moses Agreement and the Act of Congress ratifying and confirming it, supra, pass title in fee to Long Jim upon the location and definite description of the lands in question?

2. If not, did they give him an equitable title, without restrictions on alienation, which would pass to his grantee by a deed executed before issuance of patent?

ASSIGNMENT OF ERROR.

1. The Supreme Court of the State of Washington erred in holding that the Moses Agreement of July 7, 1883, accepted, ratified and confirmed by Act of Congress July 4, 1884, did not pass title in fee to Long Jim for the tract of land set apart and allotted to him August 11,1894, in conformity with said agreement, and Act.

2. The Court erred in holding that "At the time the conveyance under which plaintiff claims title to the land was executed the United States held the title to the land sought to be conveyed, in trust for the Indian appellants."

3. The Court erred in holding that defendants were pro-

hibited by law from conveying any title that they may have had at the time they made the conveyance of March 29, 1900.

4. The Court erred in holding that the warranty deed of defendants, made and executed to the plaintiff March 29, 1900, did not pass the after acquired title of defendant in error by virtue of patent issued August 2, 1905.

5. The Court erred in holding that the deed executed March 29, 1900, by defendants to plaintiff was void.

BRIEF OF ARGUMENT AND AUTHORITIES.

We shall discuss the questions involved from three points of view, viz., Judicial, Departmental and Congressional construction, and while it may seem logical that Judicial construction should be reached last in order, we have deemed it best to place it first.

JUDICIAL CONSTRUCTION.

A casual reading of the opinion of the Supreme Court of the State of Washington, (Rec. 17, 52 Wash. 138), will disclose the fact that the court reached its conclusions without reference to the decisions of this court; the only authority cited on the principal point is *United States vs. Moore*, 161 Fed. 513, and the reasoning in that case is not without its faults, surely not in harmony with decisions of this court.

It is fundamental that in the construction of written instruments and statutes, every portion thereof must be considered and given effect if possible. If no ambiguity appears on its face, it will be interpreted in the light of its own language, giving words their ordinary and usual meaning, except when they have a technical meaning. Measured by this standard, it seems evident that the Moses Agreement and Act of Congress in ratification thereof intended to and did confer upon Long Jim a title in fee to the lands identified and set apart for him in 1894, under and by virtue of said agreement and act. True, no technical words of conveyance are used, but these are not necessary. A deed from Smith to Jones with-

out these would be good, providing that an intention could be gathered from the instrument that Smith intended to divest himself of title and confer it upon Jones. So far as we can ascertain, no court in modern times has decreed that an equitable title would not pass under such circumstances, and the better rule, the one more in conformity with the progress and spirit of the times, is that both legal and equitable title would pass. It is to be borne in mind that the treaty or agreement is the real instrument with which we have to deal, for the Act of Congress expressly *ratified* it, which must mean that it takes nothing away,—adds nothing to. The Act then must be read in the light of the agreement. Now the Indians, through Chief Sar-Sarp-kin *asked "to be protected in their rights as settlers,"* and this was agreed to. It was then further agreed that "All other Indians now living on the Columbia reservation" (of which Long Jim was one) *"shall be entitled to* 640 *acres,"* "in the possession and *ownership* of which they shall be protected and guaranteed." If it had been intended that they should have the mere right of occupancy, as the Supreme Court of Washington held, why was it necessary to say they would be protected in their *ownership?* Apt words could have readily been found by those making the treaty that it was only the intention to give the Indians a mere occupancy, if it was so intended. Ownership means the right of control, the exercise of dominion over the thing owned, including a right to retain or transfer.

"Ownership: The complete dominion, title or proprietary right in a thing or claim."

Black's Law Dict. Page 866.

Ownership and possession are two distinct things. An owner may be in possession of the thing owned, but one not an owner may also be in possession of the thing. If the Moses Agreement did not intend to confer ownership of lands on the Indians, the use of the word "ownership" was not only superfluous, but was deceptive. It cannot be used interchangeably with possession, the word used first in the agree-

ment, nor as a synonym thereof. It must have been placed in the agreement for a purpose, to express a meaning, to convey to the Indians in plain, concise language that they were to be owners of the land. This is the logical construction, even if the agreement were between two men standing on an equal footing. But by an unbroken line of decisions this court has said that where the government is dealing with unlettered people like the Indians, the agreement must be construed in the light of their understanding, and never to their prejudice.

In *Jones vs. Mehan*, 175 U. S. 1; 44 Law. Ed. 49, this court said:

"In construing any treaty between the United States and an Indian tribe it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Worcester vs. Georgia, 6 Pet. 515, 8 Law Ed. 483; *The Kansas Indians* 5 Wall. 737, 760, sug., Nom. *Blue Jacket vs. Johnson County Comrs.*, 18 Law Ed. 667; *Wan-Zop-E-Ah vs. Miama County Comrs.*, 18 Law Ed. 674; *Choctaw Nation vs. United States*, 119 U. S. 1, 27, 28, 30 Law Ed., 306, 314, 315.

In the leading case of *Worcester vs. Georgia* (1832), Chief Justice Marshall, speaking of article four of the treaty of Hopewell of November 28, 1875, between the United States and the Cherokee Indians which defined "the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States" (7 Stat. at L. 19), said: "There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that everyone makes his mark; no chief was capable of signing his name. It is probable that the treaty was interpreted to them." "Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word *'allotted'* from the words *'marked out'?"* 6 Pet. 551, 552, 8 Law Ed. 497, 498. And Mr. Justice McLean, concurring, said: "The language used in treaties with Indians should never be construed to their prejudice." "To contend that the word 'allotted,' in reference to the lands guaranteed to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." 6 Pet. 582, 8 Law Ed. 508.

And it was expressly held that the language used in the ninth article of the treaty then under consideration, "There shall be set apart * * * 640 acres * * * for the chief Moose Dung," conveyed to him a title in fee for the lands in said amount thereafter selected by him. So in *United States vs. Brooks*, 10 How. 442, 13 Law Ed. 489, also cited and quoted with approval in *Jones vs. Mehan*, supra, it was held that a treaty with Indians providing that they "Shall have their right to" certain lands, and the lands "shall be laid off" had the effect of a present grant, the court approving, saying: "It is true that the treaty there in question reserved the rights

of those persons and their heirs and assigns forever; but the like construction has since been given to reservations unaccompanied by any words of inheritance."

The case of *Jones vs. Meehan*, supra, was decided in 1899. It makes a careful, comprehensive and analytical review of former decisions of this court, quoting copiously therefrom. Deducible therefrom are these principles:

1. An agreement with Indians must be construed with reference to their understanding.

2. Language in a treaty or agreement with them such as "there is reserved to their use," "they shall have the right to" and sentences of similar nature and respect, must be construed as granting title in fee, unless there are other apt words of limitation.

3. Where language is used which confers only an equitable title and a further grant or patent is contemplated an alienable title is acquired which passes to a grantee of the Indian upon issuance of patent, even though deed is made before the patent, unless alienation is prohibited by the treaty, agreement or act of Congress.

4. That where alienable title is once conferred on an Indian, neither an Act of Congress or executive order can recall or restrict it, and all such attempts are void.

Later cases have not restricted or modified these principles. In *Francis vs. Francis*, 203 U. S. 223, 242, 51 Law Ed. 165, 168, *Jones vs. Mehan* is approvingly cited and quoted, and it is held that by the Chippewa treaty of 1819, saying "there shall be reserved for the use * * * of the children of Bokowtonden 640 acres on the Kawkawling river," conferred a title in fee, and that the provisions of a patent subsequently issued restricting alienation were void. It is true that in a general provision of the treaty, reservations were made for certain Indians and their heirs, but as above shown, in *Jones vs. Mehan*, supra, the use of the word heirs is not necessary to the passing of a fee simple title in an Indian treaty.

The same principles have in effect been announced in the recent case of *Mullin vs. United States*, 224 U. S. 448, 557, 56 Law Ed. 834, in this language:

"It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established; and there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of patent. There was undoubtedly a complete equitable interest, which, in the absence of restriction, the owner could convey."

Doe Ex dem. *Mann vs. Wilson*, 23 How. 457, 16 Law Ed. 584; *Crews vs. Burcham*, 1 Black 352, 17 Law Ed. 91; *Jones vs. Mehan*, 175 U. S. 1, 15-18, 44 Law Ed. 49, 55, 57, 20 Sup. Ct. Rep. 1.

The fundamental error of the Supreme Court of the State of Washington seems to have been its unwarranted assumption that at the time of the Moses Agreement there was some general Statute of the United States prohibiting the alienation by Indians of the allotted lands. No such statute was cited, and we think none could have been for the very good reason that it did not exist. This is made plain in *Jones vs. Mehan*, supra, where, in discussing an opinion given by Attorney General Tawney to the effect that there was a general law restricting the alienation of such lands, this court said that within a year thereafter, and perhaps as a result thereof, the same staute was re-enacted omitting the restriction on lands allotted in severalty, and continued: "But the inference appears to us to be irresistible that Congress did not intend that there should thenceforth be any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. And this view is confirmed by the re-enactment of the provision, in the very words of the Act of 1834, in paragraph 2116 of the Revised Statutes, and by the course of decision in this

court in a series of opinions which may conveniently be considered in their chronological order."

And numerous decisions are then quoted and analyzed, demonstrating the correctness of the court's position that no restrictions are placed on the alienation of lands allotted to Indians in severalty unless by the terms of agreement, or Act of Congress, whereby such lands are allotted.

The holding, also, that no after acquired title of Indian lands passed, because in contravention of United States law, is fraught with the same error. It assumes there is some general law obnoxious to alienation, when in fact there is none. If alienation is prohibited, it must be by the terms of the Moses Agreement, and the Act of Congress ratifying it, and, as we have elsewhere shown, they can have no such effect, when interpreted in consonance with the decisions of this court. It follows that if Long Jim had even an equitable title to the lands allotted him, without restrictions on alienation, the legal title, when conferred upon him by issuance of patent, would inure to the benefit of his grantee.

Mullin vs. United States, supra.

There can be no question that Long Jim was clothed with some kind of title, either legal or equitable, from the date of the selection and definite location of his land (1895), under the Moses Agreement and Act of Congress, the only question being, *was* it alienable?

IN PARI MATERIA.

The Supreme Court of the State of Washington places much stress on the doctrine of in pari materia. It will probably not be disputed that the doctrine has its greatest scope of operation in public acts, and does not apply at all to private acts, except when the legislation is on the same subject matter and between the same parties, and then only to a limited extent.

Black on Interp. 210.

Both the Act of Congress ratifying and confirming the

Moses Agreement and the one directing the issuance of patent to Long Jim were riders attached to general Indian appropriation Acts, but it is difficult to see how this would convert them from private to public acts. This court judicially knows that it is the prevailing practice of Congress, and has been for years, to ride these appropriations with private acts. Now, instead of being a legislative construction of the Moses Agreement and the Act of Congress confirming it, the act directing issuance of patent to Long Jim, in so far as the direction that the patent should contain the clause "free of all restrictions as to sale" implies that prior to issuance of patent there was such restriction, is in the nature of a self-serving declaration of one party to a contract. Long Jim's title rested upon a contract with the United States. The contract itself shows a valuable consideration—the doing of something which Long Jim, or the chiefs contracting for him claimed they were under no legal obligation to do, and the surrender of a vast tract of territory conceded by the United States that they at least had the right to occupy. If Long Jim ever had any alienable title to the land in question he had divested himself thereof by warranty deed to Starr under date of March 29, 1900, five years before Congress directed the issuance of patent to him. It is not shown, and is not a fact, that Long Jim, or any one acting for him, was instrumental in procuring the passage of the act directing the issuance of patent, and as Starr was the real beneficiary of the *Act* the presumption is logical, and it is a fact that Starr himself was the moving spirit in procuring the passage of the last mentioned act. Moreover, his rights should be measured by the law as it stood on March 29, 1900, when he received deed from Long Jim. If the deed conferred any rights upon him they were then vested, and cannot be destroyed by any subsequent act of Congress, much less by intetrpretation. If the Moses Agreement and the ratifying act should be construed as conferring an alienable title, unaided by the act directing issuance of patent, under the circumstances, they

should be so construed with it. But there are other circumstances which throw light on the subject. Prior to 1904 Long Jim made application to the Commissioner of the General Land Office for a patent in fee to the lands involved. Mr. Starr was one of his attorneys. The published decision, of course, does not show this, but the records do. The matter was finally submittted to the Secretary of the Interior. He refused the application on the very narrow ground that he was not authorized to issue patent. Applicant's position was that while he was already clothed with the full legal title he was entitled to muniments thereof. In denying the application it was said: "It may be, under all the circumstances, that the allotment to Long Jim became presently operative so as to vest in him the full legal title to the land in question, *as is contended by him.* On the contrary, it may have been the intention of Congress to *change the terms of the treaty,* so as to place limitations upon the right conferred on Long Jim under his allotment. * * * In this view in the absence of an *express* requirement to that effect, the department is without authority, and is justified in refusing to issue patent in this case."

Long Jim, 32 Land Dec. 568.

Here it will be observed the Secretary conceded that if the Act of Congress did not modify the Moses Agreement Long Jim was clothed with an absolute fee simple title, and that this was Long Jim's contention. The act itself says it ratifies and confirms the Moses Agreement. All the courts dealing with the question have decided it was "ratified and confirmed" (not modified). The Supreme Court of the State of Washington concedes it in the case at bar. Judge Whitson of the Federal Court expressly so decided (*United States vs. Moore,* 154 Fed. Rep. 712), and in reversing that case the Circuit Court, Ninth Circuit, also concedes it. (*United States vs. Moore,* 161 Fed. Rep. 513). Within a year after the Secretary's decision, and presumably as a result thereof, Congress passed the Act "that the Secretary of the Interior

he and hereby is, authorized and *directed* to issue a patent in fee to Long Jim for the lands *heretofore allotted* to him * * * free of all restrictions as to sale, incumbrance or taxation."

Act of Congress, March 3, 1905, 33 U. S. Stat. at Large, p. 1064.

The Secretary of the Interior having expressed a doubt as to whether Long Jim's title was alienable (solely because he thought the Act of Congress ratifying and confirming the Moses Agreement might have been intended to modify it) it was deemed advisable to dissipate this doubt and make the title merchantable by the insertion of the clause "free of all restriction as to sale," etc.

In the case of James B. White, et al, 20 Land Dec. 171, it was held:

"If he (an Indian allottee) had a right to convey, it follows as a matter of course that the transferee has right to a patent * * * while it is doubtless true that the title of Besiah is complete without patent, still the patent is desirable and important as an invaluable muniment of title and a source of quiet and peace to its possessor * * *. The doctrine which is thus expounded seems to me to justify the inference that it is the right of a citizen to have patent issue as a *just recognition* of a previously existing title from the government."

And patent was accordingly issued to the Indian allottee's grantee. If this may be properly done it is difficult to see why patent may not issue to the allottee himself, for the benefit of his grantee, after the allottee has divested himself of title by warranty deed, or why a precautionary clause inserted in the patent "as a recognition of a previously existing title" should be converted into a cross upon which to crucify the grantee.

But if the Act of 1905 is to be used at all for the purpose of aiding in the proper construction of the Moses Agreement as ratified and confirmed by Act of Congress, let it be remembered that it *directs* that patent issue for the lands "heretofore *allotted*."

To "allot" lands by virtue of agreement or treaty with the Indians has been uniformly held by this court to pass title in fee, in the absence of express or necessarily implied restrictions on alienation.

Best vs. Polk, 85 U. S. (18 Wall) 112; 21 Law Ed. 805.

Worcester vs. Georgia, 31 U. S. (6 Pet.) 515, 582; 8 Law Ed. 483, 508.

Minnesota vs. Hitchcock, 185 U. S. 373; 46 Law Ed. 954.

See also,

Jones vs. Meehan, supra; *Meehan vs. Jones*, 70 Fed. Rep. 453.

See also,

Anthony vs. American Glucose Co., 41 N. E. 26; 146 N. Y. 407.

Fort vs. Allen, 14 S. E. 685.

Hence the words "heretofore allotted" in the *Act* directing issuance of patent are a recognition of pre-existing title in fee simple.

DEFENDANTS' ALLEGATION OF FRAUD.

The case of the *United States vs. Moore*, 154 Fed. Rep. 712, dealing with lands involved in the Moses Agreement, was decided by the United States Circuit Court for the Eastern District of Washington before the trial of the case at bar in the Superior Court of Chelan County, Washington, and the present case was also tried before the reversal of the Moore case by the Circuit Court of Appeals. (161 Fed. Rep. 573). Therefore, in order to avoid the law as decided when defendants filed their answer, and as an aid to procure the vacation of a default theretofore entered against them the defendants seem to have conceived it necessary or advisable to allege and attempt to prove that Starr procured his deed from Long Jim by fraud, but we here call attention to the fact that there was a signal failure of proof on this score, the trial court having found squarely against it and the Su-

preme court of the State of Washington refused to disturb said findings.

JUDGE WHITSON'S DECISION.

The opinion of Judge Whitson in *United States vs. Moore*, supra, is so exhaustive, replete with logic, sound on principle and fortified with precedent, and he having practiced law for nearly a quarter of a century where he knew Indians as he knew white men, understanding their habits of life, their customs, their desires and ambitions, their mode of thought and method of arriving at an understanding, and a man of such exceptionally high character, and a jurist of fine legal attainments, we herewith reproduce at considerable length the main portion of his opinion, believing it entitled to great weight in the consideration of this cause. It follows (Italics are ours):

"It is well settled that Congress may pass the title to public lands by enactment of a statute, and it has been repeatedly held that such a method is quite as effective to divest the government of its title as the issuance of a patent. *New York Indians vs. U. S.*, 170 U. S. 1, 42 L. Ed. 927, and cases therein cited. So it has been held by the Supreme Court that a fee simple title may pass by virtue of a treaty with the Indians without the aid of an act of Congress or patent from the United States. *Holden vs. Hoy*, 84 U. S. 211, 21 L. Ed. 523; *Jones vs. Meehan*, 175 U. S. 1-10, 20 Sup. Ct. 1, 44 Law Ed. 49, and cases therein cited. The latest re-affirmance of the doctrine is found in *Francis vs. Francis*, 203 U. S. 233, 51 Law Ed. 165.

"Another principle equally well settled is that, where the language of a treaty with the Indians is susceptible of more than one construction, it is to be construed in the sense that they would naturally have understood it. Not that the language can be given a greater effect than the words can be fairly held to imply, but that such interpretation is to be given, considering the situation of the Indians, the subject matter with which the parties are dealing, and the purpose in view, as will effectuate what was in their minds when the treaty was entered into. *Jones vs. Meehan*, supra. It is not to be overlooked, that the Indians, notwithstanding the fact

that their contention in that regard has never been sustained, have always claimed, while being gradually but surely borne down by the resistless march of civilization, to be the primary owners of the soil. The pitiful story of what they regard as their subjugation, attributable to their want of adaptation and defiance of our progress as a nation, may be referred to for the purpose of throwing light upon their understanding of the agreement. While they have been compelled to surrender, they have never abandoned their claim, but have always regarded themselves as a people despoiled of their rightful inheritance. They have ever maintained that the whole of the territory of the United States justly belongs to them. If they have apparently acquiesced in a different theory, it is not that they have changed their views, but because they have been perforce compelled to do so. To their traditions, to their claim of ownership, to the Indian understanding of the subject generally, and to the fact that these Indians in particular were in possession of a large reservation, which they were asked to cede to the government to the extent of their right therein, we may look for aid in arriving at a conclusion as to what they understood by the use of terms of ambiguous import. The agreement must have been reached through the medium of an interpreter, by which means their simple ideas were to be transformed into technical words, and this makes the requirement that the matter be examined with care all the more necessary, that the true meaning be not misunderstood.

"It was agreed that Sar-sarp-kin and his people were to be allowed to remain on the Columbia Reservation, where they at the time lived, and they were to be *protected in their rights as settlers*, and in addition to the ground they already had under cultivation, they were to be allowed to select more unoccupied land in *severalty*, making a total to Sar-sarp-kin of four square miles, and to each head of a family or male adult one square mile. The agreement seemed to contemplate that Moses and his people would go upon the Colville Reservation, but in the event they did not elect to do so, they were provided for in this language: 'All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land to each head of family or male adult, in the *possession* and *ownership* of which they shall be *guaranteed and protected.*'

"It does not appear whether allotment No. 7 is held by one of the Sar-sarp-kin tribe or under the agreement with the people of Chief Moses. If the allottee belonged to the people of Sar-sarp-kin, 'each head of family or male adult,' was to be 'allowed' one square mile in *severalty*. Indians belonging to the Moses tribe were to be '*entitled*' to the same amount of land, but the word '*severalty*' which was used in dealing with the Sar-sarp-kin tribe, gave way to the words '*ownership* and *possession*.' It is manifest from a reading of this agreement that the Indians were attempting to make their wants known. If the phraseology is slightly changed it must be attributed to the difficulty of accurately expressing their demands by interpretation from a very simple language into one so rich in shades of meaning. The intention was to give to each tribe the same right, and it is clear that the words to express those rights were used indifferently. It is true that the language used in the agreement was not expressed in technical words, such as "there is hereby granted," etc., or the like, but it is difficult to suppose that the Indians had anything else in view other than their acquisition of the *absolute title* to the lands by them *selected*. Ownership of land has a broader significance than the mere right of occupancy. Bouvier defines 'owner' as follows:

"'He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases.'

"Ownership is defined as:

"'The right by which a thing belongs to some one in particular, to the exclusion of all others.'

"To say that one owns land, and is entitled to the possession of it, and yet the nature of the tenure is possession only, is to limit the estate. Ownership of property is understood by the most primitive peoples. It is the first step toward organized society.

"Self preservation at once suggests it, and the right to live and the necessity for living from one's own industry perpetuates it. This it must be assumed the Indian tribes understood. Their precarious means of subsistence would have impressed it upon them. To what end were the Indians to surrender their claims to the Columbia Reservation? There could be no possible consideration for it if the contention now made should be sustained for they were relinquishing their

right of occupancy to this vast body of land without getting any better right to the 22,000 acres set apart for them; and a contract of this character between private individuals, unless the title to the land should vest, and something more than the mere right of occupancy should be granted, could be set aside for want of consideration. To hold that these lands were to be considered as individual reservations would conflict with the express language of the agreement, as the Indians understood it, and under which they made their relinquishment to the reservation as then constituted, and it would apparently present an anomaly in the history of the dealing of the government with the Indians generally.

"The rule that the courts will pay due regard to the construction given a treaty or statute by the heads of the departments, invoked here on behalf of the government, is one which has often been referred to with approval by the Supreme Court, and must have due consideration.

"Having found what must have been the understanding of the Indians, we are now to ascertain the understanding of the other party to the agreement, and this we must deduce from the act of Congress, as well as the action of the officers charged with the supervision of the Indians, as disclosed by the public documents having reference to the matter. Turning first to the statute, it is to be remarked in view of the provisions of the Act of March 3, 1871 (16 Stat. 544, C. 120) now designated as Section 2079 of the Revised Statutes, that the agreement depends for its validity upon the Act of Congress. Havng reference to the agreement, Congress declared its intention as follows: Which agreement is hereby *accepted, ratified* and *confirmed,* including all expenses incident thereto, etc. We find a provision that Sar-sarp-kin and the Indians then residing on the Columbia Reservation should elect within one year from the passage of the act whether to remain on that reservation or remove to the Colville Reservation, and touching that portion of the agreement it was expressly provided:

" 'That in case said Indians so elect to remain on said Columbia Reservation, the Secretary of the Interior shall cause the quantity of land *therein stipulated to be allowed* them to be selected in as compact form as possible; the same when so selected to be held for the *exclusive use* and *occupation* of said Indians, and the remainder of said reservation to be

thereupon restored to the public domain.'

"A fair application of the rules of statutory construction leads to the conclusion that it was the intention of Congress to ratify the agreement, and that the phraseology of the act, which is somewhat different from that of the agreement, was not intended as an amendment or limitation of it as it had been entered into. The agreement was amended in regard to the time in which they should exercise their option, but the substitution of the phrase, '*exclusive use* and *occupation* of said Indians' in the Act of Congress, instead of '*in the possesion and ownership of which they shall be guaranteed and protected,*' could not in the light of the *unequivocal* and *express ratification*, have been intended as an amendment.

"It seems that the only remarks on the measure when it was up for passage, were made by Mr. Brents, delegate from Washington Territory. Among other things, he said: 'Good faith and good policy both demand of us that we should *keep the agreements* with these Indians.' To keep the agreement certainly meant something more than taking a tract of agricultural land, amounting to 2,143,040 acres, to which the Indians had the right of occupancy, and giving them a much smaller area of the same country, to be occupied only by them. The contention that they were to occupy individual reservations without title is not in accord with their well known habits of life and ideas relating to the use of land. On November 6, 1883, the Commissioner of Indian Affairs reported to the Secretary of the Interior (Cong. Rec., Vol. 15, p. 2538), in regard to this particular agreement, as follows:

" 'This agreement, if ratified by Congress, will restore to the public domain some 2,143,040 acres, in addition to the 749,300 acres restored by executive order of February 23, 1883, in case the Indians elect to remove to the Colville Reservation, while if they decide to remain, some 22,000 acres only will be required to *allot* the quantity of land stipulated by the agreement. It is not considered desirable that this large reservation should be long held for the few Indians who live upon it. It is clear, however, that they are entitled to some compensation for its relinquishment, as it was given them by the officers of the government, in whose assurances they must have had confidence. I have therefore prepared

the draft of a bill *providing for the ratification of the agreement* and the necessary appropriation for carrying it into effect. From the nature of the stipulation it appears impossible to submit a detailed estimate of the funds required. I have named a sum ($85,000) which is believed to be sufficient for the purposes required. As the agreement leaves the question of removal of the Indians to the Colville Reservation optional with them, I have inserted a section requiring them to decide within one year from the passage of the bill whether they will remain or move.'

"The bill submitted by the Commissioner was apparently adopted, without amendment. It would be assuming bad faith, duplicity, and fraud on his part, in the light of his report, *when he asked to have the agreement ratified*, to suppose that he intended to limit the act of ratification in a way to defeat the *manifest purpose for which it was made*. It cannot be assumed that he intended to perpetrate a fraud upon the Indians. Nor can it be supposed that the Secretary of the Interior would give his countenance to that which could be only designated as a trick, a scheme, or devise for misleading them in order to secure a *surrender of their claims to so large a body of land*. On the contrary, the record discloses the utmost good faith on the part of those officers.

"To *'allot'* had come to have a technical meaning. When the Commissioner used that word, it must be concluded that he was familiar with what it implied. That Congress so understood it is further shown by a letter from General Miles, which was read when the bill was under consideration, as the following quotations will show:

" 'By the terms of this agreement, the Indians surrender the valuable and extensive reservation, comprising 2,649,600 acres of territory (except what land the few families remaining take in *severalty*) in consideration of the government giving them protection on the Colville reservation and the means of making themselves self-supporting.' "

"He further said:

" 'This is a case where the government has an opportunity and by fair dealing and proper consideration for the interests of the Indians, can, for a very moderate consideration, locate a very large number of Indians in *severalty* or by families, and put them in a way to make themselves self-supporting and to become a productive, prosperous people.'

"That letter concluded as follows:

" 'I earnestly recommend that the *terms be faithfully complied with* on the part of the government.' Cong. Rec., Vol. 15, p. 2571.

"And thus Congress had before it the *construction* not only of the *military officers* officially cognizant of the matter, but of *those who brought about the agreement.*

"In the light of this history of the measure, to hold with the contention that Congress intended to modify the agreement with the Indians, except insofar as to fix a time in which they were required to make their election, would be to accuse it of a deliberate and willful fraud—a thought of course not to be harbored for a moment, and, even if it could be supposed that such a thing were possible, that construction which is consistent with good faith must necessarily be adopted if the expression of the legislative will is sufficiently manifest to justify it.

"In Long Jim vs. Robinson, et al., 16 Land Dec. Dep. Int. 15, the Secretary of the Interior, in sustaining the rights of these Indians, used the language which follows:

" 'That said Indian applicants are *entitled to have allotments* of land made to them in *severalty* in quantities and manner provided in the agreement of July 7, 1883, and that the right of said several white claimants above named to the land claimed by them is subordinate and subject to the prior and superior right of said Indians. I can see no legal reason as between them (referring to the Indians) and the United States for the government withholding from them the *full benefits it agreed to bestow upon them.*'

"As illustrative of the views entertained by the Commissioner of Indian Affairs, on January 5, 1900, he wrote to the Honorable Secretary contending that Congress had no power to amend a treaty or agreement made with the Indians without their consent. He said in part:

" 'It is certainly a novel proposition in law that one party to an agreement may, without the consent of the other, alter or modify an essential part of such contract. It is apparent that no court of law would uphold or enforce any contract so altered or amended. In all our dealings with the Indian tribes I do not find that any agreement has ever been amended by Congress without providing for the assent of the Indians interested. In one or possibly two cases Con-

gress has entirely ignored an agreement for the cession of lands upon the grounds that the Indians, parties thereto, were not the owners of the land ceded; but it was never attempted to write in new and different words in a single agreement, without providing that the agreement should be open to rejection or adoption by the Indians interested.'

"Senate Document, No. 76, 56 Cong., First Session.

"Until April 13, 1905, the matter thus apparently rested without substantial dispute until the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior contending for the view which the government would not uphold; but it may be observed that the contention is not in accord with the contemporaneous construction both of the agreement and of the statute. But we cannot wholly rely upon the understanding of the department now upon the views expressed in Congress when the act was before it, *unless the statute is susceptible of an interpretation which is in accord with the manner in which the Indians understood it.* That question remains to be examined. For many years prior to 1883 it had been the effort of the government to break up the tribal relations of the Indians, and to secure for them 'divided and individual ownership;' and the agitation for the *allotment* of land in *severalty* is said to have begun as far back as the days of James Madison. Annual report of Secretary of the Interior (Indian Affairs), 1900, p. 660.

"It would be unprofitable to enter into a detailed reference to the numerous public documents, reports of the Commissioner of Indian Affairs, Superintendents and Indian Agents, all looking to the ultimate breaking up of tribal relations and the conferring of citizenship upon the Indians. An interesting summary of the subject may be found in the Annual Report of the Secretary of the Interior (Indian Affairs) for 1900, p. 660, 661, et seq. The agitation finally took definite and practical form by act of February 8, 1887 (24 Stat. 388, C 119), which provided for allotments in severalty.

"Prior to that time there appears to have been no general statute under which the Indians could receive land in that way, except the act of May 20, 1862 (18 Stat. 420, C 131), conferring the benefit of the homestead law upon native born Indians, which was little availed of; but it had been the constant endeavor of those interested with the supervision of

the Indians to inculcate in their minds a desire for the *individual ownership*, and for taking land in *severalty*, and assuming the duties of citizenship; and *title in severalty, described as allotments*, was well understood by the Indians, the Department of the Interior, and, of course, by members of Congress. These particular tracts of land, made certain when selected under the provision of the law, were designated as *allotments*, in accordance with the understanding that *allotments did represent individual ownership*, and this was in consonance with the policy of the officers of the government, who sought to induce the Indians to assume individual responsibility in lieu of their system of tribal ownership. And Congress being advised that the Department of the Interior, through the Secretary and the Commissioner of Indian Affairs, had secured an agreement with these Indians *to take lands in severalty*, confirmed that action, in the light of which it is not doing violence to the statute to construe it in connection with the agreement, as meaning that each head of a family or male adult was *entitled to one square mile of land in severalty*, in the *ownership* and *possession* of which he should be *guaranteed and protected*.

"It will naturally occur that it has of late years been a well defined policy to limit the right of alienation, and this ought to have some bearing upon the conclusion to be reached in this case; but such has not been the uniform practice in dealing with the Indians. Many cases construing Indian treaties are referred to in Jones vs. Meehan, supra. They present good variety in explaining the purpose of the parties in the many compacts therein reviewed. Those cases cannot be examined here at length, but the proper interpretation of these may best be understood by setting out the conclusion of the Supreme Court in its own language:

" 'The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land whether already identified or to be surveyed and located in the future, *the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple,*

and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty or of an act of Congress, has expressly or impliedly prohibited or restricted its alienation.'

"Cherokee Nation vs. Hitchcock, 187 U. S. 294, 47 Law Ed. 183, in no way conflicts with the contention of the defendant. The Indians in that case held no title in severalty. At page 307 of 187 U. S. (47 L. Ed. 183), it was said:

" 'Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. Eastern Bands of Cherokee Indians vs. United States, 117 U. S. 288-308, 29 L. Ed. 880. The manner in which this land is held is described in Cherokee Nation vs. Journey Cake, 115 U. S. 196, 207, 39 L. Ed. 120, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: "Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them." '"

"It should be remembered, also, that this agreement antedates the allotment act of 1887, and that prior thereto the policy applicable to community interests of these people had not been fixed in that respect, although in relation to Indian homesteads future action was foreshadowed. Holding, as it must be held, that the fee passed to the Indians upon the location and identification of their allotments, pursuant to the agreement which was ratified by the Act of Congress, and it appearing that no restraint on alienation was made, and assuming that the defendant, as suggested by counsel, holds by conveyance from the heirs of an allottee made prior to the Act of March 8, 1906 (Stat. 1905-06, p. 55, C. 629), it results that the government has no interest in the land which it seeks in this action to control."

DEPARTMENTAL CONSTRUCTION.

This agreement and similar ones have been construed by the Land Department, the Indian Department and by the Bureau of American Ethnology.

Royce, in his Indian Land Cessions in the United States, on

the title page of which it is said to be an extract from the Eighteenth Annual Report of the Bureau of American Ethnology, says on page 921: "These allotments to Sar-sarp-kin and his band are described by metes and bounds in the executive order of May 1, 1886; but as they have become individual property, it does not come within the scope of this work to delineate them on this map." The allotments included the "other Indians." This work was published in 1900, and shows the understanding of that Bureau.

In the discussion that follows, under the head of Congressional Construction, we show the construction evidently placed by the Indian Department acting in conjunction with Congress, upon the words "use," "separate use," "exclusive use," which are words closely akin to those used by Congress in confirming the agreement under discussion and the words "exclusive use and occupation," which are the exact words used in such confirmation. For the reason that they are fully set out there they will not be repeated here.

Long Jim was not one of those mentioned in the thirty-seven allotments made in the Executive order of May 1, 1886, opening the former Columbia Reservation. His allotment was made afterward and after his contest with white settlers finally decided in his favor, by the Secretary of the Interior, 16 L. D. 15. In that case the Secretary on page 20 said: "I can see no legal reason, as between them (the Indians) and the United States for the government withholding from them the full benefits it agreed to bestow upon them. That agreement was the solemn obligation of the United States made by its executive branch and ratified by Congress. Good faith and fair dealing demand that the government perform its agreement in letter and in spirit." He also says, referring to the granting clause in the agreement (page 20): "This amounts to an absolute guaranty of the government to the extent named of the *right to* and possession of the lands in possession of these Indian applicants, as they clearly come under the head of 'other In-

dians' living on the Columbia Reservation."

The Honorable Secretary, on page 22 of the same decision, speaking to the Honorable Commissioner, says: "After a full and elaborate discussion and consideration of the record and facts in the case, you held: 'That said Indian applicants are entitled to have *allotments of lands made to them in severalty* in quantities and manner provided in the agreement of July 7, 1883, and that the right of said several white claimants above named to the land claimed by them is subordinate and subject to the prior and superior right of said Indians.' After a careful examination of the testimony and record in the case, I am satisfied that your judgment is correct, and it is accordingly confirmed."

That was the final decision of the Land Department and was the situation when the land was conveyed to Starr by Long Jim, and upon that authority we submit Starr had a right to rely.

There is no escaping the conclusion that the Secretary of the Interior was of the opinion that the Indians were entitled to the fee.

In the case of Lac De Flambeau Indians, 9 L. D. 392, which arose upon the question as to whether the treaty of September 30, 1854 (10 Stat. 1109, 2 Kappler 648), was changed and amended by the general allotment act of February 8, 1887, as to the character of the restrictions upon alienation, and which was a treaty in which there was "assigned to his or their *separate use*" certain tracts, the Secretary of the Interior uses this language: "I am, therefore, of the opinion that the right of allotment being secured to these Indians under the treaty stipulation of 1884, when said allotments are made, patent thereunder be issued in accordance with the terms of said treaty, whether the selections and allotments were made or the approvals signed before or after the passage of the act of 1887; for the treaty is the source of power, all these acts are performed in pursuance of its authority, and the title when perfected relates back to that source and cuts off any intervening claim."

CONGRESSIONAL CONSTRUCTION.

There are two works that will be referred to frequently in the following pages: One is Indian Laws and Treaties, by Charles J. Kappler, which is a well known work published by the government, and which will be cited as Kappler; the other is by Charles C. Royce and is entitled "Indian Land Cessions," and on its title page is said to be an "Extract from the eighteenth Annual Report of the Bureau of American Ethnology." It is published by the government and will be cited as Royce. Kappler's work in a marginal note at the head of each treaty gives the Statute at large where the treaty will be found and the date of the proclamation promulgating it.

USE, SEPARATE USE, EXCLUSIVE USE AND USE AND OCCUPATION.

Treaty with the Choctaw, November 16, 1805.
Promulgation by Proclamation, February 25, 1808.
Kappler, Volume 2-87.

Art. One recites a cession of a large tract of land to the United States. It also provides for the "reservation of a tract of 5,120 acres, one-half for the *use* of Alzira, the other half for the *use* of Sophia, daughters of Samuel Mitchell, by Molly, a Choctaw woman. The latter reserve to be subject to the same laws and regulations as may be established in the circumjacent country; and the said Mungoes of the Choctaws request that the government of the United States may confirm the title of this reserve in the said Alzira and Sophia."

Royce Land Cessions, 673, says: "This reserve was partitioned and sold by the Mitchell family."

Treaty with the Chickasaw, September 20, 1816.
2 Kappler, 135.

Art. 2 provides for a cession of lands by the Chickasaw Nation to the United States.

Art. 4: "The Commissioners agree that the following tracts shall be reserved to the Chickasaw Nation:

1. One tract of land for the *use* of Col. George Colbert and heirs (describing it).

Royce, page 683, says: "Confirmed to George Colbert and his heirs by treaty of October 19, 1818. Subsequently deeded to the United States May 15, 1819.

2. "A tract of land two miles square * * * for the *use* of Apassan Tubby and heirs."

This was ceded back to the United States in consideration of $500.00 paid him, by Article 5 of the Treaty with the Chickasaws, October 19, 1818. 2 Kappler 174, Art. 5, 176.

3. "A tract of land one mile square * * * for the *use* of John McCliesh and heirs."

Confirmed to John McCliesh and heirs by treaty of October 19, 1818. 2 Kappler 176.

4. Two tracts of land, containing forty acres each * * * for the *use* of Major Levi Colbert and heirs. 2 Kappler 135.

Confirmed by treaty of October 19, 1818 (2 Kappler 176), to Major Levi Colbert, in these words, "shall enure to the *sole use* of the said Major Levi Colbert and their (his) heirs forever. (Description follows.) This agreement is made upon the following express conditions: "That the said land and those living on it shall be subject to the laws of the United States, and all legal taxation that may be imposed upon the land or citizens of the United States inhabiting the territory where said land is situate."

This latter provison was made by the same articles to apply to the tracts reserved to John McCleish and his heirs.

It will be seen that the first grant was made to the Chickasaws evidently in trust for the use of the individuals and heirs, and in the subsequent treaty the grant was made to the *sole use* of each of them and their heirs: The provision in the latter treaty making the land subject to taxation by

the local authorities makes it clear that the Senate intended so long ago as 1816 and 1818 that the terms "use" and "sole use" were intended to pass the fee.

This is all the more apparent when we refer to the provisions of the Treaty with the Wyandot, etc., of September 29, 1817. 2 Kappler 145.

The treaty provides for the cession of certain lands to the United States, and in Article 6 there are several provisions of the following character: The United States agrees to grant by patent in fee simple, to (naming persons) chiefs and their successors in office, for the *use* of the persons named in the annexed schedule. In the schedules that follow the treaty are given the names of the persons and the provision that the land shall be divided equally among them.

Article 7 of the treaty provides: "But the use of the land shall be in the said person; and after the share of any person is conveyed by the chiefs to him, he may convey the same to any person whatever. And any one entitled by the said schedule to a portion of said land may, at any time, convey the same to any person by obtaining the approbation of the President of the United States, or of the person appointed by him to give such approbation." This latter clause was a restriction upon alienation which was eminently proper to prevent the confusion that would result if the persons named in the schedule could convey before receiving the full title, or rather the evidence of title.

As if to emphasize the fact that the term "use" was meant to pass the fee, the last clause of article 6 provides: "There shall also be *reserved for the use* of the Ottawa Indians, but not granted to them, etc."

The Treaty with the Chippewa, September 24, 1819 (2 Kappler 185), provides for a cession of lands to the United States, and in Article 3 it is provided: "There shall be reserved for *use* of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land:"

Then follows the setting apart for the *use* of each of several persons certain tracts of land. Patents in fee were issued to each of them without reservation, except the one for the use of the children of Bowkowtonden, and that one has been the subject of judicial consideration and determination in the Michigan courts and in this court in *Francis vs. Francis*, 203 U. S. 233; 51 L. Ed. 165, in which this court held that the fee passed by virtue of the language used in the treaty. The case is discussed in this brief under the head of Judicial Construction.

The Treaty with the Osage, June 2, 1825, 2 Kappler, 217, provides for a cession of land to the United States and Article 5 provides: "From the above lands ceded and relinquished, the following reservations, for the *use* of the half-breeds, hereinafter named, shall be made." Then follows the names of forty-two persons and the amount of land set apart to each. No provision is made in the treaty for the issuance of a patent but in the treaty with the Cherokee of Dec. 29, 1835, ten years afterward, 2 Kappler, 439, 442, in Article 4, this agreement was made: "The United States also stipulate and agree to extinguish for the benefit of the Cherokees the titles to the reservations within their country made in the Osage treaty of 1825 to certain half-breeds, and for this purpose they hereby agree to pay to the persons *to whom the same belong* or *have been assigned*, etc."

This land has been held for the use of the half-breeds and both the Indian Department and Congress are on record as recognizing that the setting apart for the *use* of a named person a tract of land by the government passed the fee when they proposed to extinguish the title of those to whom the lands belong or have been assigned. The fee evidently passed without limitation.

The treaty with the Miami, Oct. 23, 1826, 2 Kappler, 278, provides in Article 1 for a cession of land to the United States, and in Article 2 is the provision: "From the cession aforesaid the following reservations, for the *use* of the

said tribe, shall be made:" then follows a list, some of them evidently to bands of the tribe and some for individuals.

Article 3 provides that: "There shall be granted to each of the persons named in the schedule hereto annexed, and to their heirs, the tracts of land therein designated; but the land so granted shall never be conveyed without the consent of the President of the United States."

From a cursory reading it would appear that here was a clear distinction and that the language "reservation for the use" (in Art. 2) of the tribe or individuals was not meant as a grant. It will be noticed that in Article 3 the language used is: "There shall be granted to each of the persons,—and their heirs." This is probably as strong language as can be imagined to pass the title unless the words "in fee simple" had been inserted. The clause in Article 3 placed in juxtaposition to the term *use* in article two would seem to imply that it was not intended by the term *use* to pass as large an estate as by the terms "grant" and "heirs," or at least not without more restrictions. We are free to confess that if the construction placed upon the term "use" in the ratification of the Moses agreement depended upon what light might be had from its use in this treaty, we would feel like throwing up both hands. But fortunately the Indian Department and Congress are found making a different construction of the word "use" in the treaty of 1826 than seems apparent. In the Treaty with the Miami, Oct. 23, 1834, 2 Kappler, 425, eight years after, in Article 8 thereof we find the following: "The United States agree to cause patents in fee simple to issue to the following named persons, for the several tracts of land attached to their names, *granted* to *them* by former treaties." Then follows a list of names and tracts of land in amount, and among them are the individuals mentioned in Article 2 of the Treaty of 1826.

From this we conclude that the language in Article 3 of the treaty of 1826 was not placed there for the purpose of detracting from the force of the word "use" but for the

purpose of separating them so that the limitation of the alienation could be attached to the lands covered by Article 3 and not to those covered by Article 2. Thus we see that Article 2 was intended to grant an alienable title in fee simple, while Article 3 passed the title with restrictions.

In line with the above we find that Article 3 of the Treaty with the Chippewa, July 29, 1829, (2 Kappler, 297-8) it is provided that "From the cession aforesaid, there shall be reserved for the *use* of the undernamed chiefs and their bands" certain tracts and in the treaty with the same tribe September 26, 1833, (2 Kappler, 402-3) in the last clause of Article 3 thereof we find the provision: "Two thousand dollars to be paid to Wan-pon-eh-see and his band, and fifteen hundred dollars to Awn-Kote and his band, as the consideration for nine sections of land, granted to them by the third article of the Treaty of Prairie du Chien of the 29th of July, 1829, which are hereby assigned and surrendered to the United States."

Thus again we see that the Indian Department and Congress construe the expression "reserved for the *use*" to be equivalent to a grant.

Again we find in the Treaty with the Ottawa, February 18, 1833, (2 Kappler, 392) the following expression in Article 2: "It is agreed that out of the lands hereby ceded, the following reservations shall be made; and that patents for each tract shall be granted by the United States, to the individuals respectively and their heirs for the quantity of land assigned to each, that is to say:—A tract of fifteen hundred acres shall be laid off at the mouth of the river, on the south side thereof, and to be so surveyed as to accommodate the following persons, for whose *use* respectively each tract hereinafter described is reserved." Then follows the names of the grantees and the amounts allotted to each.

Article 3 of said treaty provides that as to certain named Indians, who are among those named in Article 2, "the lands hereby reserved for them, are not to be alienated with-

out the approbation of the President."

Thus we see that at the time this Treaty was made it is certain that the term "grant" and "for whose *use*—is reserved" meant absolutely the same thing.

The Treaty with the Chippewa of September 30, 1854, (2 Kappler, 648-9) has the following provision: "And may assign to each head of family or single person over twenty-one years of age, eighty acres of land for his or her *separate use;* and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants with such restrictions of the power of alienation as he may see fit to impose."

We find a similar provision in the Treaty with the Winnebago, February 27, 1855, in Article 4 (2 Kappler, 690-691), and also in the treaty with the Walla Walla, etc., June 9, 1855, in Article 6 (2 Kappler, 694-696).

Article 3 of the Treaty of Sault St. Marie, August 2, 1855, (2 Kappler, 732) contains this provision: "The United States also give to the Chief, O-shaw-waw-no for his own use, in fee simple, a small island, etc." with a provision that if the same had been previously disposed of the *grant* should be void.

Thus once more we find the Indian Bureau and Congress using the expression for his *own use* synonymous with the "fee simple" and "grant."

We also find in the Treaty with the Winnebago, April 15, 1859, (2 Kappler, 790) in Article 1, which is an article making provision for the assigning in severalty of the eastern portion of a tract 18 miles square *granted* by the United States to the tribe February 27, 1855, (2 Kappler, 690) and the balance to be sold for the purchase of stock and the building of homes on the land assigned. In Article 1 it is recited "That certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned, respectively, and that they are for the *exclusive*

use and benefit of themselves, their heirs and descendants. And said tracts shall not be alienated in fee, leased or otherwise disposed of, except to the United States, or to other members of the tribe, unless such rules and regulations as may be prescribed by the Secretary of the Interior; and they shall be exempt from taxation, levy, sale or forfeiture until otherwise provided by Congress."

Still we find the Indian Department and the Senate sustaining our contention.

Like provisions are made in the following treaties, and in each case it is self-evident that it is the intention to pass the fee:

Treaty with the Chippewa, July 16, 1859, Article 1 (2 Kappler, 792-794; Treaty with the Saux and Foxes, October 1, 1859, Art. 3, (2 Kappler, 796-7); Treaty with the Kansa Tribe, Oct. 5, 1859, Art. 3, (2 Kappler, 800-1); Treaty with the Delawares, May 30, 1860, Art. 2, (2 Kappler, 803-4); Treaty with the Arapaho and Cheyenne, Feb. 18, 1861, Art. 3, (2 Kappler, 807-8); Treaty with the Potawatomi, Nov. 15, 1861, Art. 2, (2 Kappler, 824-5). In the last named treaty the language used is: "said tracts are set apart for the perpetual and exclusive use and benefit of such assignees (allottees), and their heirs."

In the Treaty with the Klamathow Oct. 14, 1864, (2 Kappler, 865-7), we find an entirely different expression. "Article 6, The United States may in their discretion, cause a part of the whole of the reservation provided for in Article 1 to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions: To each head of family shall be assigned and granted *******. The Indians to whom these grants shall be guaranteed the perpetual *possession* and *use* of the tracts thus granted and of the improvements placed thereon; but no Indian shall have the right to alienate."

Since the act of March 3, 1871, no treaty has been made

with any tribe or body of Indians, but the agreements made with them when ratified by Congress have the same binding effect, as far as this discussion is concerned, as had the treaties.

The act of June 28, 1898, Sec. 11 (30 Stat. 495; 1 Kappler 92), provided for the allotment by the Dawes Commission of the lands of the five civilized tribes to the individual members thereof in the following language: "Sec. 11. That when the roll of citizenship of any one of said Nations is fully completed as provided by law, and the survey of the lands of said Nation or tribe is also completed, the Commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the *exclusive use and occupancy* of the surface of all lands of said Nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, *giving* to each, as far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of the same; but all oil, coal, asphalt and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt or mineral deposits."

Here it is evident that it is the intention of Congress to convey the title to the surface of lands to the individuals, reserving the minerals as the common property of the tribe, and the expression "Exclusive use and occupancy" is the identical expression that we find used theretofore in the act of July 4, 1884, ratifying and confirming the Moses Agreement.

It is further provided in the same section "That the lands allotted shall be non-transferable until after the full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be non-taxable while so held."

An examination of all the provisions relative to the manner of obtaining title makes it evident that this section refers to the evidence of title.

Section 12 provides: "That when reports of allotments of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments, the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this Act."

This is very much like the Moses Agreement which provides that "in the possession and ownership thereof he shall be guaranteed and protected."

As showing that the title passed with the allotment of the *exclusive use and occupation* as soon as confirmed by the Secretary of the Interior, the last clause of Section 16, page 97, provides: "That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her or their allotment."

It will thus be seen that in making treaties and agreements with the Indians, the Senate in the days of treaties and Congress since that time in cases like the one at bar, where a cession is made, or a relinquishment of claim is made by the tribe to a large body of land and there is a setting apart to the individual Indians of a portion of the same land, the Senate and the Congress, in addition to other terms, have largely used, for the purpose of passing the title to the individual, the expression "set apart for the use," "separate use," "exclusive use," "permanent use" and "use and occupation." Congress evidently clearly understood the expression in the agreement: "All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which he shall be guaranteed and protected," as an intention to give the individual Indian absolute ownership of 640 acres, to be afterward selected, and that when they "accepted, ratified and confirmed" the agreement and were about to throw open the balance of the land to the public domain, they used the language for which there was abun-

dant precedent and said, in effect, to the citizens seeking a home on this part of the public domain: Here, within this former Columbia Reservation are tracts of land reserved or "held for the exclusive *use* and *occupation* of said Indians," upon which you are forbidden to go, but the balance of the reservation is restored to the public domain, thus using the language that had been used time and again to pass the fee and making it as plain as possible that it was the intention of Congress to *confirm* the agreement, exactly as it has been made.

The treaties and agreements with Indians can be searched in vain for any precedent for action culminating in such construction as the defendants in error are endeavoring to have placed on this agreement. Nowhere in the history of all the dealings with the Indian has he been placed on a tract of land separate and apart from his tribe that he has not been secured in the ultimate title. True, he has frequently and very frequently been hedged about with restrictions as to the alienation, and the frequency with which they have been used points clearly to the fact that had Congress been inclined to make any restrictions on the alienation there was abundant precedent not only for the action, but for the mode of expressing it, and had restriction been intended, it would have been indicated in plain words.

We respectfully submit that the judgment of the Supreme Court of the State of Washington should be reversed, with directions to enter judgment in favor of plaintiff in error.

FRANK REEVES *and*
R. W. STARR,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 151.

R. W. STARR, PLAINTIFF IN ERROR,

vs.

LONG JIM AND ANNIE, HIS WIFE, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

Acts Leading Up to the Moses Agreement.

We deem it advisable to lay before the court the facts that immediately precede the making of the Moses agreement and which caused the making of it, which we draw from the report of the Commissioner of Indian Affairs of 1883 and the statements and letters in the House of Representatives at the time of the confirmation of the Moses agreement, as shown in the Congressional Record, vol. 15, pages 2570-1.

The Columbia reservation had been set apart for Chief Moses and his band and other friendly Indians by Executive order of April 19, 1879.

It appears that before that time valuable mines had been discovered on a portion of the tract so set apart for Moses and his people. The white people interested in the mines made complaint to the proper department, an investigation was had, and as a result a strip 15 miles in width on the northern end of the reservation was restored to the public domain by Executive order of February 23, 1883.

Chief Moses resented this action, claiming that he was being robbed of his property, and became so restive that General Miles, commanding that department, called attention to the fact that Moses was becoming hostile and requested authority to send Moses, with an officer and an interpreter, to Washington in order that such action might be taken as would restore peaceful relations.

This was done. Moses and Sarsarpkin, of the Columbia reservation, and Tonasket and Lot, of the C[illegible]ille reservation, came to Washington in charge of an army officer, and there entered into an agreement with the Secretary of the Interior and the Commissioner of Indian Affairs on the part of the Government, which is set out in full in plaintiff's brief, pages 1 to 3, inclusive.

This agreement was presented to Congress, and by them was "accepted, ratified, and confirmed" by act of Congress of July 4, 1884 (23 Stats. at Large, 79 and 80), and which act is set out in full on pages 3 and 4 of our original brief.

We have recited the facts leading up to the making of the agreement in order to throw light upon some of its provisions.

One of the provisions showing the former disposition of Moses is "that until he and his people are permanently located on the Colville reservation his status shall remain as now, and the police over his people shall be rested in the military." Another is that Sarsarpkin asked that he and his people be "protected in their rights as settlers." Still

another, in which tracts are to be set apart to individual Indians, provides that "in the possession and ownership of which they shall be guaranteed and protected." In view of the fact that Moses had been making complaints that he and his people were being interfered with, which complaints were so vigorous and hostile in their character as to call the attention of the military department to them, it is evident that what they desired was to be protected from the encroachments of the whites, and that is evidently the character of protection desired and to which the Executive Department agreed.

Just before the passage of the bill in the House Mr. Brents, Delegate from Washington Territory, said:

> "The treaty is favorable to the Government and fair to the Indians. Good faith and good policy both demand of us that we should keep the agreement with the Indians."

He also had read a letter from Brigadier General Miles, Commander of the Department, in which he said:

> "This is a case where the Government has the opportunity, and by fair dealing and proper consideration for the interests of the Indians can, for a very moderate consideration, locate a very large number of Indians in severalty or by families and put them in a way to make themselves self-supporting and to become a productive, prosperous people."

The report of the Commissioner of Indian Affairs upon the matter (Report of Commissioner of Indian Affairs, 1883) is quite fully set out in Judge Whitson's decision and quoted in our main brief, page 22.

In the debate there was no dissent to any of these statements and Congress evidently contemplated no change in the agreement, and made none. Had there been an intention to make a change and to limit the alienation apt language could have easily been found.

No Imposition on the Indian.

We feel constrained to quote the language of this court in the case of Pickering *vs.* Lomax, 145 U. S., 310, as it covers so completely one phase of the case.

> "The object of the proviso was not to prevent the "alienation *in toto*, but to protect the Indian against "the improvident disposition of his property, and it "will be presumed that the President, before affixing "his approval, satisfied himself that no fraud or im-"position had been practiced upon the Indian when "the deed was originally obtained. Indeed, the "record in this case shows that the President did "not offer his approval until affidavits had been pre-"sented, showing that Pickering was the owner, and "that the amount paid to Robinson was the full value "of the land, and that the sale was an advantageous "one to him."

In the case at bar fraud had been charged and a court of competent jurisdiction had passed upon the matter and had found that a fair, full, and adequate consideration had passed to the Indian.

Respectfully submitted,

FRANK REEVES,
R. W. STARR,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

October Term, 1912.

No. 151.

R. W. STARR,
Plaintiff in Error,
vs.
LONG JIM and ANNIE, His Wife,
Defendants in Error.

In Error to the Supreme Court of the State of Washington

Brief of Defendants in Error

F. T. POST,
A. G. AVERY,
(Spokane, Wash.)
For Defendants in Error.

STATEMENT OF THE CASE.

Notwithstanding the brief of the plaintiff in error has not been served, we shall submit the brief of the defendant in error, for otherwise it seems that there would be but scant time in which to do so. In order to do this understandingly we shall make a brief statement of the case.

On or about July 7, 1883, the United States, through the Secretary of the Interior and the Commissioner of Indian Affairs, entered into a tentative arrangement or agreement with certain tribes of Indians in the State of Washington, which agreement is commonly known as the "Moses Agreement." A copy is as follows:

AGREEMENT WITH THE COLUMBIA AND COLVILLE, 1883.

In the conference with Chief Moses and Sar-sarp-kin, of the Columbia reservation, and Tonaskat and Lot, of the Colville reservation, had this day, the following [illegible] was asked for by the Indians:

Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte Creek to accommodate one hundred pupils (100), and a physician to reside [illegible] and $100 (one hundred) to himself each year.

Sar-sarp-kin asked to be allowed to remain on the Columbia Reservation with his people, where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen mile strip cut off from the northern portion of the Columbia Reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one

square mile; or to move on to the Colville Reservation, if they so desire, and in case they so remove, and relinquish all their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling-house for himself; also to construct a saw-mill and grist-mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claim upon the Government for any land situate elsewhere.

Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation, and engage in farming, equal rights and protection alike with all other Indians now on the Colville Reservation, and

will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people. That until he and his people are located permanently on the Colville Reservation, his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected. Or should they remove on to the Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

All of the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement; and that, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville Reservation until Congress does make such appropriation, etc.

H. M. TELLER,
Secretary of Interior.

H. PRICE,
Commissioner of Indian Affairs.

MOSES (his x mark),
TONASKET (his x mark),
SAR-SARP-KIN (his x mark).

As provided by the terms of the Moses Agreement, it was confirmed by Act of Congress approved July 4, 1884 (23 Stats. 79-80) as follows:

"For the purpose of carrying into effect the agreement entered into at the City of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville Reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, That Sarsopkin and the Indians now residing on said Columbia Reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville Reservation; *And provided further*, That in case said Indians so elect to remain on said Columbia Reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected as an compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

Long Jim, one of the defendants in error, is one of the Indians concerning whom the Moses Agreement was made, and because of that fact the lands herein involved, and other lands, were set apart for him by departmental action. Said order (omitting the preamble) is in the following language:

"Now, therefore, I, Hoke Smith, Secretary of the Interior, in accordance with the promises of said agreement, ratified and confirmed by said Act of Congress, and under the said decision of the General Land Office affirmed by the Department, do hereby set apart for the exclusive use and occupation of said Indians [Long Jim and others] the following described lands, namely: * * * For Long Jim [here follows the description of an allotment, including the lands referred to in the record which include those described in the complaint.]

"April 11, 1894.

"HOKE SMITH,
"Secretary."

(See "Executive Orders relating to Indian Reserves, from May 14, 1855, to July 1, 1902," pages 123-4).

Thereafter, and on April 20, 1894, the above order was modified so as to eliminate certain of the lands originally allotted, and the allotment so amended was confirmed. (Executive Orders relating to Indian Reserves, from May 14, 1855, to July 1, 1902, page 124).

Long Jim and his wife Annie, also an Indian, took possession of this allotment, which contained something in excess of five hundred acres. About March 29, 1900, they executed a writing in the form of a warranty deed, bearing even date, which purported to convey to the plaintiff in error, R. W. Starr, with the usual covenants, this entire allotment for a consideration named as $2,000. Starr thereafter took possession of the allotment. On August 2, 1905, in accordance with an Act of Congress, March 3, 1905, (33 Stat. 1064) a patent was issued to Long Jim for this allotment.

On or about the 9th day of February, 1907, the plaintiff in error commenced an action in the Superior Court

for Chelan County, State of Washington, against Long Jim and Annie, by filing a complaint wherein he alleged that they claimed some interest in the lands; that such claims were of no validity and that they had no right, title or estate therein, and it was prayed that the claims of the defendants therein be declared invalid and of no effect and that they be enjoined from setting up any claim to the premises, or any part thereof. (Transcript pp. 1-2)

The summons and complaint in said action were served on the defendants, who made no appearance in the case and a decree by default was filed therein on the 20th day of May, 1907. Said decree granted all of the relief prayed for. On or about the 20th of September, 1907, the United States Attorney for the Eastern District of Washington, acting under the directions of the Department of Justice, and at the request of Long Jim and Annie, filed a motion in said state court to set aside the decree so entered by default, and to permit the Indians to file an Answer therein. This motion was supported by the affidavit of Long Jim and that of Captain John McA. Webster, Indian Agent at the Colville Agency. The affidavits above referred to stated, among other things, the reasons why said Indians did not appear and defend in said action, that their defense was that the deed which they had given to the plaintiff in error was procured by fraud and that they had no right or power to convey said allotment, because the same belonged to the United States under the terms of the Moses Agreement.

This motion was granted by the Superior Court, and after the answer setting up the defenses referred to was filed (Transcript pp. 2-5) and issues joined thereon the case was tried in the state court in March of 1908. The result of the trial was that a decree was entered on March 31, 1908, wherein the deed given by the Indians was declared valid and they were decreed to have no right to or interest in the land. From this decree an appeal was

prosecuted to the Supreme Court of the State of Washington, which Court sustained our contention herein, reversed the judgment of the lower court, declared that the deed referred to was void and of no effect whatever, that the Indians were the owners of the land, and that the plaintiff in that action had no right or interest therein. (Transcript, pp. 17-27). The question of fraud was not passed on because as said by the Court: "In view of the conclusion we have reached on certain legal questions involved in the case, we deem it unnecessary to enter upon a discussion of the facts." (Transcript, p. 20). Said judgment of the Supreme Court provided, however, that the Indians should pay to Mr. Starr the consideration which he claimed he had given for the deed, with interest thereon, and all taxes which he had since paid on the property allotted. This part of the Supreme Court's decision was in accordance with the offer of the Indians, in their answer, to make Mr. Starr whole in that respect. The case was remanded to the Superior Court for further proceedings in accordance with such decision, and thereupon the sums to be paid by the Indians to Starr were, together, found to be $3,209.00, and a decree was entered in accordance with the decision of the Supreme Court, conditioned on the payment of this sum to Starr by the Indians. (Transcript, pp. 8-9). They paid into Court said sum in accordance with the decree. Thereupon another appeal from the last decree was prosecuted to the Supreme Court of the state by the plaintiff in error, for the purpose, it was said in the appellant's brief, of testing in this court the question there presented. The Supreme Court of Washington affirmed the last judgment and decree of the Superior Court (59 Wash. 190), on the grounds stated in its former opinion, (Transcript, pp. 24-25); and it is from such decision that the writ of error herein is prosecuted.

ARGUMENT.

Notwithstanding there are seven assignments of error by the plaintiff in error, the questions involved therein are actually, at best, but three in number; namely, (1) Whether or not the Government parted with the title to the land covered by Long Jim's allotment when such allotment was made, or prior thereto when the Moses Agreement was approved; (2) Whether or not the deed of the defendants in error to the plaintiff in error, dated March 29, 1900, passed the after acquired title of the defendants in error by virtue of the patent issued to Long Jim August 2, 1905; (3) Whether or not the Statute of Limitations prevented the defendants in error from asserting their defenses herein. If we are in error in our analysis of the assignments it will not be of serious consequence because an argument on the three questions above suggested will necessarily cover the entire case, and inasmuch as this brief is written before service on us of the brief of the plaintiff in error, we shall assume that this treatment of the issues will answer the contentions made in his brief.

I.

What was the effect of the allotment to Long Jim of the land involved herein, under the Moses agreement of July 7, 1883, confirmed by act of Congress July 4, 1884?

Because this precise question has been twice passed upon contrary to the contention of the plaintiff in error, and opinions rendered which cover our views, it is with some difficulty that we approach the question in an attempt to add comments or suggestions not already reasonably presented by the opinions in the cases referred to. (United States v. Moore, 161 Fed. 515; State v. Long Jim, 32 Wash. 136).

What is to be ascertained is the intention of Congress when it consummated the Moses Agreement by the Act of July 4, 1884 (23 Stat. 79, 80). If Congress intended to retain its title to the land, and the language of the act when read with the agreement is consistent with that intent, then the decision of the state court must be affirmed so far as this feature of the case is involved.

The agreement says that these Indians shall be entitled to their respective allotments "in the possession and ownership of which they shall be guaranteed and protected." What they desired was to live as "settlers" and have the individual right of each to occupy all of the reservation changed so that they could occupy the land in severalty, that is each could occupy, independent of the others, a particular portion of the reservation. The use of the word "severalty" means nothing more, and its use in numerous statutes providing for the transfer of less than the entire fee is common. (10 Op. Attys. Gen'l. 511).

This so-called Moses Agreement is not a treaty, nor, it appears to be a bearing on the part of the Government of some requests on the part of the Indians which were approved by the Secretary of the Interior and Commissioner of Indian Affairs. There was no ceding of territory as a primary consideration for any acts on the part of the Indians, as is obtained the case, but there was an apparent disposition on the part of the Indians to live more in accordance with the ways of the white man, and this disposition was incidentally encouraged on the part of the Secretary of the Interior, who for that purpose desired to give the Indians severally an opportunity to cultivate and live upon portions of the lands theretofore reserved severally, without molestation by other Indians or whites.

It was suggested in the lower Court that if the Act of 1884 did not pass title to the Indians then to that extent it was void because the agreement contemplated that such

title should pass. We do not think that the agreement should be so construed, and the Circuit Court of Appeals in the Spurr case so holds, but if it could, we suggest that it requires two parties to make an agreement, and if the agreement is not to stand as it was accepted by Congress, then it stands not at all, and the Indian in this case does not have and never had (prior to receiving his patent) even the rights the Government conceded to him. In other words, the agreement stands as amended by the Act of Congress, or in law it does not exist. The fact that Congress did not send the agreement back to the Indians for further consideration does not warrant the contention that the agreement (if different in effect from the act confirming it) stands unaltered and was ratified by Congress without condition.

Section 2079 of the Revised Statutes, which was in effect when this agreement was made, expressly provides that there shall be no contracts with the Indians by treaty. The sole right then on the part of the Government or the Indians to enter into any obligations with each other depended upon the action of Congress. This was recognized in the so-called agreement. Congress could have refused to ratify the agreement; it could ratify it on such terms and conditions as it saw fit, and it did see fit to provide that the allotments provided for were "to be held for the exclusive use and occupation of said Indians." Whatever the Indians may have thought, Congress only intended to do what it stated in the Act, to-wit: Give to the Indians the right to use and occupy the lands. We are conceive of no more apt language to define the rights of the Indians in and to this land.

Again, the world "held" is pregnant with meaning in this respect. The Government, through the Secretary of the Interior, was to select the respective parcels of land and when so selected it was to hold the same for the use and occupation of the Indians. To say that it was

intended that the lands should be held by the *Indians* for their own use and occupation would be an unwarranted construction, yet it would in no wise militate against our contention herein, but the language so plainly indicates that it was meant that the lands would be *held* by the *Government* for the use and occupation of the Indians that it must remove any doubt remaining. It is entirely immaterial what construction be placed on the original agreement. Neither the Secretary of the Interior nor the Commissioner of Indian Affairs could bind the Government; that power existed only in Congress.

For the Government to *hold* this land for the exclusive use and benefit of the Indians was in accord with its policy at the time the Act was passed, and is in accord with its policy in dealing with the Indians today, except in so far as it has expressly provided for their right to alienate. There is no question of fraud or unfairness on the part of the Government, nor is there any issue before this Court as to the Indians' understanding of the rights sought under the agreement or granted by Congress, except in so far as it is apparent from the language of the Act, wherein it differs from the agreement. Even if there is a substantial difference in effect between the agreement and the act approving it, it cannot be said that because the Indians did not get what they requested that they are entitled to it. They got nothing more or less than what Congress gave them. If it was less than they requested, it may well be assumed that Congress would give that or nothing. Congress had as valid a right to modify the agreement as it had to refuse its approval entirely.

It must be presumed that the Government at all times has tried to deal fairly with the Indians, with their welfare in view, and that if it withheld from them something by them desired, it was for their good and not for the purpose of an advantage in favor of the Govern-

ment. There can be no other presumption than that Congress, in passing this Act, had in mind the best interests of the Indians and was seeking to protect such interests. The existence of these presumptions, which must be conceded, warrants us in considering what Congress must have thought would be best for the Indians in enacting the statute above quoted.

The learned judge, who decided the Moore case adversely to our contention in the lower Court, in his opinion, says:

> "This conclusion has been reached with much reluctance, for no doubt it would be better for the Indians to sustain the plaintiff's contention. They are not qualified to cope with the white race, and the result of this decision, should it be sustained in the higher Courts, will no doubt be prejudicial to their best interests." (154 Fed., 712).

The Circuit Court of Appeals concurred in this view but reversed the decision.

May we not assume—indeed are we not bound to assume—that the enlightened men who composed Congress entertained precisely the same sentiments as those expressed by the judge above quoted? And if they did entertain such sentiments, how can it be successfully contended that it was their intention, instead of aiding the Indians, to do that which is confessedly to their detriment? Again, the Indian, in 1884, was far more dependent on the Government, and much less able to cope with the white man than today, which suggests that Congress fully appreciated the disadvantage that would follow if these lands were granted outright to the Indians, and placed beyond government control.

The Court said in Ellis vs. Ross, 64 Fed. 417, ten years after the Act of Congress above referred to was passed:

"That the abolition of reservations and of the guardianship of the Indians is the ultimate hope of the policy, there can be no doubt; but it will not be soonest realized by attributing fanciful qualities to the Indians, or by supposing that their natures can be changed by legislative enactment."

Is it not probable that the gentlemen whose votes passed the law under consideration, and who had particular reasons for being well advised concerning the same, were fully aware of the dependent condition of the Indian, for they were acting at a time when his condition would more probably give rise to the sentiment above quoted than now?

The Circuit Court of Appeals, in the case of United States v. James F. Moore (161 Fed. 513), construing and explaining the Moses Agreement and the Act of Congress referred to, said:

"The agreement expressly recites that the Indians were to be 'protected' by the Government and by it guaranteed in the possession and ownership of the respective tracts of land to be set apart to them in severalty. How could the United States afford such protection but by remaining the guardian of the Indian? We think it the plain meaning of the agreement itself that it should do so, and that no party thereto could have otherwise understood. That it was to the interest of the Indians that the Government should retain such title and continue as the guardian of the Indians was recognized by the learned judge of the Court below."

And referring to who should hold these lands, the Court continues, "to be 'held' by whom? Obviously by the United States, their guardian, and to the end that they might be 'protected' against the tricks and acts of designing persons."

The land involved in this case was set apart for the Indian under the same agreement, the same act of Congress, and a like executive order.

The Supreme Court of Washington, in deciding the case at bar, approved the ruling in the Moore case. (52 Wash. 133). It is unnecessary to comment at length on these decisions or attempt to add to the reasoning therein. The question is there completely decided and the reasoning is beyond legitimate criticism. We may add, however, that the state Court had theretofore decided that the policy of the Government toward its Indian wards could only be carried out by retaining title to allotments made. This view seems to have had the unqualified assent of the State Court in Coey vs. Low, 36 Wash. 10. In Jackson v. Thompson, 38 Wash. 282, the same Court said that the Indians are wards of the Government and must be protected.

In United States v. Choctaw Nation, 179 U. S. 494, the Court said, in substance, that notwithstanding the fact that Indians are unlettered and ignorant, and notwithstanding the fact that the agreement is to their disadvantage (which is not true in this case), the Court has no right to disregard the meaning of an Act of Congress or a treaty where the intention is apparent; that the Court is not a treaty-making power and has no right to attempt by judicial construction to change the terms of an Act of Congress even for the purpose of doing what might seem to be required by justice.

In 1886 this Court, in United States v. Kagama, 118 U. S., 375, made the following observation:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no

protection. Because of the hostile feelings the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress, and by this Court, whenever the question has arisen."

If the Courts and Congress have, as stated by this Court, always recognized the condition of the Indians, what warrant is there for saying that Congress, disregarding all of its obligations, intended to turn over this land, unqualifiedly, to its weak and helpless wards, knowing, as it was bound to know, that they were no more capable of using the land and retaining its ownership against the cupidity and artfulness of the whites than an infant? Yet the plaintiff in error in effect says that the presumption is that Congress intended to do this, and this Court is asked to read into the agreement and the Act of Congress under discussion, words of absolute conveyance instead of those actually used.

In 1902 this Court said, in United States v. Rickert, 188 U. S., 432, referring to the allotments made under the general allotment act:

"These Indians are yet wards of the nation in a condition of pupilage or dependency and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887 and the agreement of 1889 ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming

the Indian of civilized life, and ultimately the privileges of citizenship.

While it is true that the case referred to dealt with allotments of a character different from that in this case, the Indians referred to were no more dependent—indeed they were not so much so, and the statement of the Court adds to the evidence showing how the Indians were considered by the Courts and by Congress. See also Lone Wolf v. Hitchcock, 187 U. S. 553; Beecher v. Wetherby, 95 U. S. 517; Hollister v. United States, 145 Fed., 773.

In view of the fact that Congress has construed the Moses Agreement and the Act approving the same in subsequent legislation, and that such construction may be considered to assist in interpreting the former legislation, we call the Court's attention to the Act of March 3, 1905 (33 Stat. 1064). This act, which has hereinbefore been referred to, authorizes the identical patent which was issued to Long Jim in this case, and is the most conclusive evidence that Congress did not, and did not intend to, part with the title or control of the Moses Agreement allotments when it ratified such agreement by the Act of July 4, 1884. So firmly was the title to this land fixed in the United States that it required an Act of Congress to give Long Jim anything therein which he could use as his own.

Again, Congress construed the effect of the Moses Agreement and the statute approving the same by passing the Act of March 8, 1906 (34 Stat. 55), wherein for the first time is provided the only manner in which these allotments could be disposed of and then only with Governmental sanction. Manifestly there could be no more convincing authority than this Act to show that the Indian had no more right to dispose of this land than any other of the lands of the United States. It was mere Indian

country," as explained from other "Indian country" that the Government could protect the allottees in occupying it as against others.

The Act of 1906 referred to assumes that the title is in the United States, and that it is held by it for the exclusive use and occupation of the Indians, and it is provided therein that trust patents shall leave to the respective allottees, but that they shall not alienate said lands within a certain period, with certain exceptions therein stated. Congress probably ascertained that after twenty-three years the Indians should receive the benefit of more definite legislation respecting their allotment and be given the right under certain conditions to alienate a part thereof.

In the case of Deger v. Western Investment Co., 221 U. S. 286 (31 Sup. Ct. Rep. 578), this Court said:

"When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. Cope v. Cope, 137 U. S., 682, 34 L. Ed. 832, 11 Sup. Ct. Rep. 222; United States v. Freeman, 3 How. 556, 11 L. Ed. 724, 548."

Said the U. S. Circuit Court of Appeals in U. S. v. Moore, *supra*, in considering the same Acts of Congress in connection with an allotment issued under the same "agreement":

"The legislative construction of its own acts is always potent. It is can be gathered," said the Supreme Court in United States v. Freeman, 3 How. 556-564, "from a subsequent statute as well as what meaning the legislature attached to the words of a former act; they will conform to a legislative declaration of its meaning, and will govern the construction of the first statute." And in the case of Philadelphia

and R. R. Co. v. Commrs. R. Co., 53 Pa. St., 20, the Supreme Court of Pennsylvania said: 'If a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended.'

"That the Acts of July 4, 1884, of March 3, 1905, and of March 8, 1906, above referred to, are *in pari materia*, is perfectly plain, for they relate to the same subject-matter and are parts of the same legislative acts. In respect to such statutes, Sutherland (St. Const., 283) says: 'All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively, as construed together, as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session, or on the same day.'

Every contention here made by the defendants in error was unqualifiedly upheld in the case last cited.

"These Indians were wards of the Government when the Act of 1884 was passed, and while it transferred to the Indian the right to use and occupy the land, it retained the legal title therein and held it for the Indian as any other guardian holds property for a ward unable, himself, to preserve it.

Long before the two acts above referred to were passed, the Secretary of the Interior had construed the Act of July 4, 1884, and the agreement which it approved, by making the different orders of allotment contemplated by them. The Secretary, in making the order of April 20, 1894, above quoted, wherein this allotment is provided for, interpreted the Act of Congress referred to according to our contentions, for the order says that these allotments

"are hereby set apart for the exclusive use and occupation of said Indians." There is not a suggestion in the order that the Secretary, acting as the instrument to grant the rights that Congress had conveyed, thought that he was by his action giving to these Indians anything more than the right to the exclusive use and possession of these parcels of land. He was not conveying it, but was setting it apart—distinguishing it from the balance of the reservation and other like allotments.

In Ellis v. Ross, *supra*, it was held that the construction placed upon a statute by departmental officers, whose duty was to carry out such laws should be considered in the matter of the interpretation. See also: McFadden v. Montana M. & M. Co., 97 Fed. 670; Hollister v. United States, 145 Fed. 773; In re Lands of Five Civilized Tribes, 199 Fed. 811 (823).

The case particularly relied on in the lower Court was Jones v. Meehan, 175 U. S. 1. We believe that case is easily distinguishable from the one at bar. That was a case where there was every indication that, whether wise or unwise, not only the Indians, but Congress, intended to pass the fee in the grant, for after the treaty was submitted to it, it singled out, in Section 8 of the treaty, all of the proposed allotments therein granted, and provided that they should not pass the fee, but should only be subject to alienation by the allottee under certain conditions, and that limited patents should be issued therefor. By this provision Congress selected for the subject of its limitations all of the allotments except those for two of the chiefs, which were larger, and deliberately exempted the latter from the effect of the conditions imposed on the remainder, thereby recognizing a desire on the part of Chief Moose Dung to take the entire fee, and the Government's desire to grant it. All of those features are lacking in this case. That Chief Moose Dung expected to be getting the entire title to his allotment is also

disclosed by the proceedings prior to the signing of the treaty, he said:

"I have taken the mouth of Thieving River as my inheritance; I do not ask the chiefs where I shall go; I make my home there"; and "I want it for a reservation for myself"; and "I used to think that this was the proper place for me to settle," and "That it would be an inheritance for my children"; and "Where all my children would have enough to live on in the future"; and "I accept the proposition because I see I am going to be raised from want to riches—to be raised to the level of the white man." The Commissioner answered, saying:

"Tell him I do not care anything about the mouth of Thieving River. He can have it if he wants it."

The chief could have no "inheritance," nor could he have any place or "inheritance" for his children, nor could he be "raised from want to riches" unless he received the fee to the land under discussion in that case. So it will be seen that both parties to that transaction understood that in giving the land to the Indian he was receiving everything consistent with the spirit of the arrangement which was being perfected, and Congress set its formal approval on such understanding by omitting to place upon the chief's allotment the restrictions imposed on the others. It should also be remembered that this decision was manifested by Section 2079, Revised Statutes, subsequently enacted, hereinbefore referred to.

The case referred to was construed contrary to the contention of the plaintiff in error by the Supreme Court of Washington in Coey v. Low, 36 Wash. 10, where it is quoted to support the following opposite view:

"Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was

a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States, without the consent of the United States."

And the Circuit Court of Appeals in the Moore case quoted liberally from Jones v. Mahan in supporting the very contention we are making here.

The entire action of Congress was for the benefit of the Indian and not to his disadvantage. To grant to these Indians, individually and absolutely, this great amount of land at a time when it must be presumed that they were utterly unfit to handle or dispose of it, would be, it seems to us, an unheard of thing to do on the part of a guardian towards its ward, and that ward one to whom the Government is bound by every principle of justice and humanity to protect to the fullest extent; a ward who is more helpless than those known among the civilized, because mere age seems to add but little, if any, strength of character or ability to profitably or safely handle his own; a ward whose incapacity is so great and so universally recognized that Congress has seen fit to heavily penalize one who even gives him an intoxicating drink, and had, at the time this agreement was ratified, declared him incapable of entering into a contract for services relative to his land without the approval of the Secretary of the Interior and Commissioner of Indian Affairs. (Section 2103, Revised Statutes.) With these acknowledged facts before us, is it possible to successfully contend that Congress ever intended to place in the hands of these irresponsible beings, who are more helpless than a minor of the white race, riches which they are incapable of handling and which at once tempt the cupidity of those whom it has been the policy of the Government to protect against?

We believe we have demonstrated that when Long Jim and Annie gave their deed to the plaintiff in error they had no interest in this allotment which they could convey and that consequently they conveyed nothing—the deed was a nullity.

There are more cases which could be profitably discussed in support of the foregoing argument, but, as they will be referred to later herein on another phase of the case, we will only cite them:

Gibson v. Chouteau, 13 Wall., 92.
Schrimpscher v. Stockton, 183 U. S., 290.
McGannon v. Straightiegg, 32 Kan., 524.
Sheldon v. Donohue, 40 Kan., 346.
Krueger v. Schulze, 70 N. W. Rep., 269.
Nelson v. John, 43 Wash., 483.
United States v. Mullin, 71 Fed., 682.

II.

It was strongly insisted in the first appeal to the state Supreme Court that even if the fee to the allotment did not pass to Long Jim by reason of the terms of the Moses Agreement, the Act approving it, and the executive order thereunder, yet, because his deed contained covenants of warranty and he had since received a full patent, he was estopped to deny the title of the plaintiff in error and his own right to convey.

The doctrine of estoppel has no application here. The Courts have rigidly held that deeds of the character here involved are absolutely void and pass no title, right or interest whatever by estoppel or otherwise.

In discussing this point we shall consider the deed given by the Indians as of the same value as one given by an Indian whose allotment contains a stipulation in restraint of alienation, for such a deed certainly cannot be more effective than the one here involved. There the

Indian and who [illegible] his allotment and by a provision in the deed is prohibited to convey it. Here the Indian has the right to use and occupy only, coupled with the Government and public policy that not only shall he not convey but that he shall not be given the right to convey and his possession and occupancy is "protected." We are surely indulging in a warranted presumption when we so class this deed.

Smythe v. Henry, 41 Fed. 705, deals that a deed such as is involved here works an estoppel in a case much like the one at bar. The North Carolina legislature granted Junaluska, a Cherokee Indian chief, 337 acres of land which he was "empowered to hold and enjoy, without the power to sell or convey the same, except for the term of two years, from time to time: provided, nevertheless, that he shall have full power to dispose of the same by devise only." Within twenty days after this grant Junaluska made a warranty deed for this land to one Sherrell and leased the land from Sherrell. Junaluska deraigned the land and died. The parties to the action were respectively the grantees of Sherrell and the devisees of Junaluska, and the validity of the restriction upon the Indian's alienation of the land was attacked and upheld. On page 708 will be found that part of the opinion especially pertinent to the case at bar. It is as follows:

"It is insisted that, as the deed to Sherrell purported to convey a fee, the grantor was estopped from denying the title of the grantee, and that this estoppel extended to all persons claiming under the grantor. The doctrine of estoppel cannot be applied when it would thwart any declared purpose of a statute, or any well-settled rule of the common law, as in the cases of infants and married women. Sims v. Everhardt, 102 U. S. 300; Dwarris v. Foster, 2 Wall. 24; Bigelow, Estop. 345. An invalid deed does not work an estoppel. Id. 258; Bank v. Banks, 101 U. S. 240.

"It is further insisted that, as Jumalesha became the tenant of Sherrell, he could not deny his landlord's title. An estoppel between tenant and landlord rests upon considerations of public policy. It cannot apply where its allowance would contravene a public policy expressed in a positive statute."

In Bank of America v. Banks, 101 U. S., 240, the Court holds:

"In order to work an estoppel the parties to a deed must be *sui juris* competent to make it effectual as a contract."

In Harkness v. Underhill, 1 Black, 316, the complainant, as assignee of Walters' heirs, contend that the assignees of Stillman were precluded from claiming title to the land involved because Stillman entered into possession thereof under a written contract with Walters, which recognized Walters' title thereto. The Court held that inasmuch as the contract was contrary to public policy and void there was no estoppel, saying (p. 325):

"But in this case there was no legal contract between Stillman and Waters. They combined to defraud the Government; their agreement was contrary to public policy, because it was intended by contrivance to take the land out of the market at public sale—a cherished policy of the Government. Such an agreement can have no standing in a Court of Justice."

In Smith v. Stevens, 10 Wall., 321, this Court, in passing on the restrictions on alienation contained in an allotment to an Indain in a case where, after disposing of the land these restrictions were removed, said:

"It is hardly necessary to say that a Joint Resolution passed nearly two years after this transaction, removing the restrictions on alienation, cannot relate back and give validity to a conveyance which,

when executed, was void, can there be any reason to suppose that Congress contemplated that any such effect would be attained for its legislation on this subject?

It is important to note in the case last cited that though there were restrictions placed on the right to convey the allotment, *the fee* was entirely vested *in the Indian*, yet this Court refused to give any effect to the conveyance.

In Drury v. Foster, 2 Wall., 24, this Court said:

"It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability at the common law that forbids the conveyance of her real estate by procuration."

In Brewster v. Madden, 15 Kan., 249, the Court, speaking through the late Justice Brewer, held that a mortgage given by a pre-emptor before entry is void because forbidden by an Act of Congress and that where there was no fraud, misrepresentation or concealment on the part of the mortgagor in such a case, there can be no estoppel. It was urged in that case that the mortgagor (pre-emptor) covenanted that he was seized with the title. His heirs were not estopped from denying the illegality of the mortgage. See also McCue v. Smith, 9 Minn., 237.

The state Court, in Nelson v. John, 43 Wash. 483, cited with approval the case of Briggs v. Sample, 43 Fed. 362, which involved the same question here presented. An Indian had conveyed his allotment prior to the time when he was given such right by the Government. After he had received his fee simple patent for the land he executed a

deed to a third person who sought by appropriate action to clear the cloud on the title to the land caused by the first deed. The defendant invoked the doctrine of estoppel, as did the plaintiff in error here. The Court said:

> "The defendants, however, insist that the title afterwards acquired by the allottee by the issuing of patent accrued by operation of law to his first grantees, under the covenants of warranty, and that he and his subsequent grantees are estopped to set up the subsequently acquired title. This position is not tenable. A void deed with covenants of warranty does not convey an after-acquired title. The grantor was incompetent, and under disability, to make the contract."

To say that the deed here involved could give rise to any right in the plaintiff in error would be to deny the principle discovered and upheld in Frazee v. Spokane County, 29 Wash. 278, that even the state cannot pass a law under which Indian allotments may be taxed on the theory that to do so would make it possible to deprive the Indians of their lands while they are "learning the lessons and duties of citizenship." The Court also says, quoting with approval from Page v. Pierce County, 25 Wash. 6 (13):

> "It would seem reasonably clear that the land in question cannot be taxed by the state so long as the Government has an interest in them, 'either legal or equitable,' or is even charged with *the performance of some obligation or duty respecting them.*" (Italics ours.)

In Standard Furniture Co. v. Van Alstine, 22 Wash., 670, it is said:

> "No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy. It is because of the public interest, and not the desire to aid the defendant that the Courts refuse to enforce such a contract, and hence the doctrine of estoppel has no application."

Again, in Reed v. Johnson, 27 Wash. 48 (56), it was held that "validity cannot be given to an illegal contract through any principle of estoppel."

In Nelson v. John, *supra*, the Court said in holding that a conveyance by Indians of their allotment was void:

"As showing that deeds by Indians of allotted lands made in contravention of restraints on alienation are treated as void, see: Libby v. Clark, 118 U. S., 250; Smith v. Stevens, 10 Wall. 321; Laughton v. Nadeau, 75 Fed. 789; Eells v. Ross, 64 Fed. 417; Briggs v. Sample, 43 Fed., 02; Smythe v. Henry, 41 Fed. 705; and cases *supra*. That the restriction upon alienation placed in this Indian's deed was valid, we believe to be sustained upon both principle and authority. To hold otherwise would be to, in no small measure, thwart the beneficent purposes which the Government had in mind in providing an allotment of tracts of land to these Indians, and would be to permit or make possible the very evils which Congress foresaw and endeavored to provide against."

See Cocy v. Low, 36 Wash. 10, where the state Court, quoting from Melchoir v. McCarthy, 31 Wis. 252, announces its adherence to the rule that

"It is quite immaterial whether such illegal contract be *malum in se*, or only *malum prohibitum*. In either case the maxim, *ex turpi causa non oritur actio*, is applicable. And a contract in violation of a statute is void although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibited, and its invalidity follows as a legal consequence."

The Wisconsin case also holds

"That all contracts which are repugnant to justice or founded on an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of a statute, are void."

Bigelow on Estoppel 5 (1890), p. 349, states the rule as follows:

"It is essential to the estoppel by deed that the deed itself (which of course must be delivered) should be a valid instrument; a void instrument, though under seal, does not work an estoppel in law or equity."

In 16 Cyc. of Law and Procedure, p. 706, it is said:

"A deed having no validity cannot be made the basis of an estoppel; and a void instrument will not operate by way of estoppel so as to vest a subsequently acquired estate in the grantee."

We believe we have demonstrated that the plaintiff in error did not, and could not, acquire title to this allotment by estoppel.

III.

In the state Court the statute of limitations and laches, on the part of the defendants in error, were urged as a bar to their recovery.

As justifying his contention that the Indians' defense is barred by the statute of limitations, the plaintiff in error cited Ballinger's Codes, Section 4800 (Sec. 159 Rem. & Bal. Code), subdivision 4. This statute is a three-years' limitation in cases of fraud, and would apply where only fraud is depended upon to set aside a transaction. The state Supreme Court did not consider the question of fraud and found that because the Indians' deed was void, it was unnecessary to do so. When other grounds form the basis of the defense, we claim the ten years' statute applies (2 Ball. Code, Sec. 4797). But whatever statute is applied, it was sufficient to avail plaintiff in error, for it did not begin to run until the Government issued to Long Jim a patent for his allotment, August 2, 1905, less than three years before the trial of the case. Prior

to the time the patent was issued the Indians could not have successfully prosecuted an action to remove the cloud occasioned by their former deed, or to have had the title of the land declared in themselves. As said in United States v. Moore, supra, they had no right to the land except to remain on it, and consequently, any action which they took towards having the title declared in themselves or in attempting to cancel their former deed for fraud, or any other reason, would have been a mere nullity.

The statute does not begin to run until a right of action accrues in the one against whom the statute is pleaded.

This Court, in Gibson v. Chouteau, 13 Wall. 92, held that the Statute of Limitations did not commence to run against a homesteader or preemptor until after a patent is issued. We quote:

> "But neither in a separate suit in a federal court, nor in an action of ejectment in a state Court can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated nor obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted."

In Slaght v. Northern Pacific R. Co., 39 Wash. 576, the Supreme Court of Washington adopts the same rule.

The case of Schrimpsher v. Stockton, 183 U. S. 290, is peculiarly in point. The statement of facts in that case

is somewhat involved, but the salient facts are substantially as follows:

Under the treaty of January 31, 1855, with the Wyandotte Indians, Carey Rogers, an incompetent by reason of being a minor, was allotted fifty-seven acres of land on September 1, 1859. The treaty, as well as the patent conveying this land to Rogers in fee simple, provided that it should not be sold at all for a period of five years, and not thereafter without the consent of the Secretary of the Interior.

On November 15, 1864, Rogers executed a warranty deed to this land and his grantees immediately took and kept possession thereof until this action was brought in 1894. In December, 1867, Rogers died intestate. On October 14, 1868, another treaty with the Wyandottes was proclaimed. It removed all restrictions on the alienation of allotments to incompetents so far as future deeds were concerned. In reference to deeds theretofore executed by incompetents it provided for an examination by the Secretary of the Interior and that "the said Secretary may confirm said sales, or require an additional amount to be paid, or declare such sales entirely void as the right of the several cases may appear." No proceedings were ever taken under this provision relative to the Rogers allotment.

The Court in the case last cited, held that the Rogers deed of November 15, 1864, was absolutely void, and further held—the point of importance in the case at bar—"no title could be gained by adverse possession so long as the land continued to be inalienable by Rogers and his heirs." The Court also held that the statute of limitations did not begin to run until the land became alienable under the treaty of October 14, 1868.

The attention of the Court is also called to the cases of McGannon v. Straightlegg, 32 Kan. 524, and

Sheldon v. Donohue, 40 Kan. 346, cited in the case last referred to.

In McGannon v. Straightlege, *supra*, the Indian allottee made a deed to her allotment on December 8, 1857. The grantee immediately entered into possession of the land and held quiet and peaceable possession thereof until the action was commenced, April 25, 1883, said title at the time being held by Straightlege. On November 4, 1859, a patent was issued by the United States to the allottee for the land. Thereafter the allottee died. On June 23, 1882, the allottee's heirs made a deed for the land to McGannon, which deed was approved by the Secretary of the Interior October 10, 1882. McGannon brought ejectment proceedings against Straightlege, who pleaded the statute of limitations. The trial Court instructed the jury that McGannon's action was barred by a three years, a ten years and a fifteen years' statute of limitations.

In reversing this decision the Supreme Court of Kansas held that the title being an Indian title—or, in other words, the title being vested in the United States and an Indian—no statute of limitations could operate against such title until after the approval, on October 10, 1882, by the Secretary of the Interior of the deed executed by the allottee's heir on June 23, 1882.

In Sheldon v. Donohue, *supra*, the statement of facts in the opinion shows that Sheldon paid Donahue $1525 in cash and gave his note for $500 and was in possession of the land about sixteen years. In reference thereto the Court says, (p. 349):

> "It is true, that Sheldon paid Donahue a considerable sum of money which has not been returned, and this fact would weigh greatly in favor of Sheldon under other circumstances and if he was not barred from acquiring title. It has been expressly

held, however, that a conveyance made in violation of a treaty will not even create an equitable estate in the grantee, although he may have paid all the purchase money and have taken actual possession of the land."

The Court's attention is called to another case wherein the same question was decided. Under the treaty of June 3, 1825, the United States allotted to certain half-breed Indians, among whom was Victoria Smith, allotments in severalty. By the Act of May 26, 1860, "all the title, interest and estate of the United States" in these allotments was "vested in the reservees," but Section 2 of this act provided that the reservees could sell their lands only with the approval of the Secretary of the Interior. On August 14, 1860, Victoria Smith sold her allotment to Stevens and he took possession of the land. July 17, 1862, Congress passed a joint resolution repealing the second section of the Act of May 16, 1860, thus removing all restrictions upon the alienation of these allotments. Thereafter Victoria Smith brought an action in the State Court of Kansas to eject Stevens from the land. At the trial he offered in evidence his deed from her of August 14, 1860. The Court refused to admit it. The Supreme Court of Kansas (2 Kan. 243), held the deed void under Section 2 of the Act of May 26, 1860, and added, "the removal of these restrictions by joint resolution of Congress of July 17, 1862, cannot be construed to make a void conveyance valid." The Court in Smith v. Stevens, 10 Wall. 321, affirmed the judgment of the lower Court, and among other things said:

"It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute, but violated its positive provisions.

Since writing the foregoing we have received the brief of the plaintiff in error, and have played the hand of the printer in concluding the work for the purpose of making a few observations on that brief, though of necessity this will be done hastily.

Plaintiff in error on page 15 of his brief, calls attention to the case of Long Jim, 32 Land Dec. 568. We do not believe that this case supports the position of the plaintiff in error. It has a contrary effect. The Secretary, it seems, did not decide that the language in the agreement alone was sufficient to pass a fee simple title to the Indian because it was unnecessary to decide that question. The expression was used by him "it may be, under all the circumstances," that the title passed. The expression quoted when dealt with the whole opinion indicates no more than that the Secretary was not passing on the question one way or the other and was only declaring that he was so doing because unnecessary for error in the case. He does say, however, that the language employed in the act of ratification is clearly susceptible of the construction which the plaintiff denies, and in support of the power of Congress to so modify the agreement that it would not pass title, whatever the language, the Secretary says, "Of the authority of Congress to make such change there is no question. It is well settled that an Act of Congress prevails over an earlier treaty with Indians with which it may conflict. Stevens v. Cherokee Nation, 174 U. S. 445; Lone Wolf v. Hitchcock, 187 U. S. 553. This is the power to declare the character and effect of titles emanating from the Government vested in Congress."

The case of Long Jim v. Robinson et al, 16 Land Dec. 15, is cited. The Secretary there said, "I can see no legal reason as between them (Indians) and the United

States, for the Government withholding from them the full benefits it agreed to bestow upon them."

The question under discussion by the Secretary when that language was used was whether or not Long Jim, who was not, directly, a party to the Moses Agreement, could secure land thereunder. We do not understand that the Secretary's statement indicates a view contrary to that taken by the defendants in error in this case. On the contrary it seems entirely consistent with such view. The Secretary decided, and we believe rightly, that Long Jim was one of the "other Indians now living on the Columbia Reservation" referred to in the agreement and as such was given rights under it. From a historical standpoint the case is of some value, for it shows considerable light on the condition of the Indians at the time the agreement was entered into and prior thereto, but we do not find that the question of the quantity of the Indians' title was considered at all. The contest was one wherein white men were attempting to locate homesteads on the land occupied by the Indian and which he had made application for under the Moses Agreement. We see no valid reason for believing that "full benefits" referred to by the Secretary meant a fee simple title, for it is not suggested, and they would be [illegible] none by withholding that title, as we have hereinbefore demonstrated [illegible].

On page 18 of his brief and following, the defendant in error quotes Judge Whitson's opinion which was reversed by the Circuit Court of Appeals for the Ninth Circuit in the case of United States v. Moore, *supra*. Of course the conclusions there stated are not the law as decided by the Circuit Court of Appeals when the case came before it for review, consequently is in no wise controlling. We suggest, however, that the opinion was based in part on a misconception of the facts as disclosed by the Court's reference to the comments made by Mr. Brents, a delegate from Washington Territory, and a letter from Gov-

eral Miles when the Act of 1884 was up for passage. We do not have access to the records referred to, but accepting them for all that it is claimed they contain, they are no criterion whatever as to the intention of Congress or the makers of the Moses Agreement. They only suggest that the men referred to were doubtful as to whether Congress would ratify the agreement *at all*, and certainly nothing therein suggests that the question was up as to whether or not the grant to the Indians should be a fee simple title or less. So far as these statements are concerned they indicate that Congress did precisely what we contend for, and what the gentlemen making these statements desired, that is, gave the Indians everything in connection with the land except the naked title, and the right to control it in so far as it was necessary to carry out the provisions of the agreement, the Act of Congress confirming it, and the duty of the Government toward the Indians, its wards. The very rights that it is now said the Government granted to the Indians and should have granted to them, in justice, equity and fairness, are the identical rights which this Court, the state Supreme Court, the Circuit Court of Appeals for the Ninth Circuit, Judge Whitson and the world at large admit would bring about every condition sought to be avoided. The statements attributed to the gentlemen referred to do not warrant the construction placed thereon by the defendant in error.

There is [illegible] confusion in quoting Judge Whitson's opinion, but inasmuch as it is supplied by us hereinbefore it will not be repeated in full. He admitted that "It would be better for the Indians to sustain the plaintiff's contention." He admitted also that the Indians "are not qualified to cope with the white race" and that his decision if affirmed would be "prejudicial to their best interests." We cannot discard the impression that the learned Judge was strangely inconsistent. He suggests in one part of his opinion that it would be a fraud

parties intended when the government stipulated that the possession and ownership of these lands by the Indians should be "guaranteed and protected." Those are the most important words in the agreement (so far as this issue is concerned) according to the State Supreme Court, and the aforesaid Circuit Court of Appeals, but notwithstanding this, both Judge Whitson's opinion and the brief of the defendant in error are silent concerning them.

The treaties referred to in the concluding portion of the brief under discussion are not available to us at this writing, and we have never examined them, but from the reference made to them it would seem that *not one* of them contains provisions such as we have just discussed in the preceding paragraph. Consequently as precedents they are of no value.

We respectfully submit that the decree of the Supreme Court of Washington should be affirmed.

F. T. POST,
A. G. AVERY,
For Defendants in Error.

STARR *v.* LONG JIM.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 151. Argued January 28, 1913.—Decided February 24, 1913.

An agreement as to division and allotment of lands between the Secretary of the Interior and chiefs representing Indians which is informal in terms and is afterwards ratified by Congress should be construed so as to confer upon the Indians the full measure of benefit intended.

The best interests of the Indians do not always require that they should be allotted lands in fee rather than by having them held in trust by the Government for them.

The agreement with Chief Moses and others of July 7, 1883, as to distribution of lands in the Columbia and Colville reservations and the act of July 4, 1884, 23 Stat. 79, validating it, and the subsequent acts relating thereto, were properly construed by the Secretary of the Interior to the effect that the Government held the land in trust for the Indian allottees for a period of ten years and without power of alienation meanwhile except by consent of the Secretary.

The general rule, that a conveyance with warranty estops the grantor when he afterwards becomes the owner to deny the grantee's title, does not apply to a conveyance made by one *non sui juris* or that is contrary to public policy or statutory construction.

An allottee Indian, who conveys by warranty deed before patent and during the period of suspension of alienation without the consent of the Secretary, acts contrary to the policy of the law and is not estopped to deny the validity of the deed after patent, and the grantee acquires no rights.

59 Washington, 190, affirmed.

THE facts, which involve the title of Indians to lands within the Columbia Indian Reservation and the construction of an agreement allotting lands between Chief Moses and others, are stated in the opinion.

Mr. R. W. Starr pro se and *Mr. Frank Reeves* for plaintiff in error.

Mr. A. G. Avery, with whom *Mr. F. T. Post* was on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The plaintiff in error brought this action against the defendants in error in the Superior Court of the State of Washington in and for the County of Chelan to establish and quiet his title to certain lands in that county. The answer showed that the plaintiff claimed his title under a deed made by the defendants, and attacked the validity of this instrument on the ground of fraud in its procurement, and on the further ground that at the time of its execution

the title to the lands therein described was in the United States, and the defendants were without power to convey them. The trial court made findings of fact negativing the charges of fraud, and concluded as matter of law that the conveyance made by the defendants to plaintiff was valid, and that the plaintiff was entitled to recover. From the resulting judgment the defendants appealed to the Supreme Court of the State, which reversed the judgment and remanded the cause, with directions to enter a judgment in favor of the defendants upon terms that they should repay the consideration paid by the plaintiff to them, with certain additional charges. 52 Washington, 138. After the cause was remanded, a further hearing was had and a second and final judgment entered in accordance with the mandate. From this judgment the plaintiff appealed, and the Supreme Court of the State affirmed the judgment, 59 Washington, 190, and the case comes here by writ of error.

The facts are as follows:—The defendants are husband and wife and full blooded Indians, and the lands in question are a part of what was the Columbia Indian Reservation. On July 7, 1883, in the City of Washington, the Secretary of the Interior and the Commissioner of Indian Affairs on the part of the United States, and Chief Moses and other Indians of the Columbia and Colville reservations in the then Territory of Washington, entered into a certain agreement, subject to the approval of Congress, the material parts of which are as follows:

"In the conference with Chiefs Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte creek to accommodate one hundred (100) pupils, and physician to reside with them, and $100 (one hundred) to himself each year.

"Sar-sarp-kin asked to be allowed to remain on the Columbia reservation with his people, where they now live, and to be protected in their rights as settlers, and, in addition to the ground they now have under cultivation within the limit of the fifteen-mile strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total to Sar-sarp-kin of four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile, or to remove onto the Colville reservation, if they so desire; and in case they so remove, and relinquish all their claims to the Columbia reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

"All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

"The Secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling house for himself; also to construct a saw mill and grist mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricultural implements as may be necessary.

"And, on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000.00) per annum during his life.

"All this on condition that Chief Moses shall remove to the Colville reservation and relinquish all claims upon the government for any land situate elsewhere.

"Further, that the government will secure to Chief Moses and his people, as well as to all other Indians who may go onto the Colville reservation and engage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people; but until he and his people are located permanently on the Colville reservation his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected; or, should they move onto the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

"All the foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing and confirm this agreement, and also, with the understanding that Chief Moses, or any of the Indians heretofore mentioned, shall not be required to remove to the Colville reservation until Congress does make such appropriation," etc.

This agreement was ratified and confirmed by act of Congress of July 4, 1884, c. 180, 23 Stat. 76, 79, which reads as follows:

"For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia

and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, that Sarsopkin and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: *And provided further*, That in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

In the above agreement of July 7, 1883 (commonly called the Moses Agreement), the following clause is especially pertinent to the present controversy, *viz.*: "All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile, of land to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected."

In the confirmatory act the following proviso is to be noted: "That in case said Indians so elect to remain on said Columbia Reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use

and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers," etc.

By an executive order made by President Cleveland under date May 1, 1886 (Executive Orders, Indian Reserves, 1890, p. 75), the land in question was restored to the public domain, subject to the limitations as to disposition imposed by the act of July 4, 1884; it being, however, at the same time ordered that certain tracts of land surveyed for and allotted to Sar-sarp-kin and other Indians in accordance with the provisions of that act, and particularly described in the order, should be and the same were thereby set apart for the exclusive use and occupation of said Indians by name. Long Jim was not included.

But by a decision of the General Land Office rendered July 9, 1892, affirmed by the Secretary of the Interior January 6, 1893 (*Long Jim* v. *Robinson*, 16 L. D. 15), it was held that Long Jim, although not a party to the Moses Agreement, was entitled to its benefits by the terms of the act of July 4, 1884, and, because he and other members of a band of which he was the Chief were in actual occupancy of the land in question, having lived upon it for many years, cultivated a part of it, raised stock thereon, etc., it was also held, following *Mission Indians* v. *Walsh*, 13 L. D. 269, that the Executive Order of May 1, 1886, did not confer upon white men claiming under the preëmption and homestead laws any right to settle on, file upon, or enter lands that were in the occupation of the Indians. It was also held that Long Jim was not deprived of his rights under the act of July 4, 1884, by reason of not having elected within one year from its passage whether he would remain upon the Columbia Reservation on the terms therein stipulated or remove to the Colville Reservation; that limitation in the Act being construed to apply only to Sar-sarp-kin and the Indians who were

directly represented by him in the making of the Moses Agreement. The conclusion of the matter was that Long Jim and certain other Indian applicants were held entitled to have allotments made to them in severalty, in quantities and manner provided in the agreement of July 7, 1883, and the right of certain white claimants to the same land was held to be subordinate and subject to the prior and superior right of the Indians.

In accordance with this decision and in pursuance of the Moses Agreement and the act of Congress ratifying it, the Secretary of the Interior, in the year 1894, set apart for the exclusive use and occupation of Long Jim a certain allotment on the Columbia Reservation, included in which are the lands involved in the present action.

On March 29, 1900, Long Jim and his wife, by warranty deed, in consideration of the sum of two thousand dollars, assumed to convey the lands in question to the plaintiff. Up to this time no patent had been issued by the Government.

In April, 1904, the Secretary of the Interior held (*In re Long Jim*, 32 L. D. 568) that the act of July 4, 1894, had made no provision for issuing a patent; that if the Moses Agreement contemplated that patents should be issued, the act of ratification limited it in this respect; and that since there was no general authority of law for issuing patents to Indian allottees, none could be issued to cover Long Jim's allotment. Thereafter Congress, by act of March 3, 1905, c. 1479; 33 Stat. 1048, 1064, 1065; authorized the issuance of such a patent, in the following terms:

"That the Secretary of the Interior be, and hereby is, authorized and directed to issue a patent in fee to Long Jim for the lands heretofore allotted to him by the Secretary of the Interior on April eleventh, eighteen hundred and ninety-four, as modified and changed by Department order of April twentieth, eighteen hundred and

ninety-four, under and by virtue of the agreement concluded July seventh, eighteen hundred and eighty-three, by and between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, commonly known as the 'Moses agreement,' accepted, ratified, and confirmed by the Act of Congress approved July fourth, eighteen hundred and eighty-four (Twenty-third Statutes, pages seventy-nine and eighty), and under the decision of the General Land Office of July ninth, eighteen hundred and ninety-two, affirmed by the Department of the Interior January sixth, eighteen hundred and ninety-three, to wit: the northeast quarter, northeast quarter of the southeast quarter and lot one of section eleven, the northwest quarter and southwest quarter of the southwest quarter of section twelve, lot one of section fourteen, and lots one and two of section thirteen, township twenty-seven north, range twenty-two east, Willamette meridian, Washington, free of all restrictions as to sale, incumbrance, or taxation."

And on August 2, 1905, pursuant to this authority, a patent was issued to Long Jim for the lands that had been allotted to him, including those that were included in his deed to the plaintiff.

By act of March 8, 1906, c. 629; 34 Stat. 55; a general provision was made for the issuance of patents for the lands allotted to Indians under the Moses Agreement and the act ratifying it, the patents to "be of legal effect and declare that the United States does and will hold the lands thus allotted for the period of ten years from the date of the approval of this Act in trust for the sole use and benefit of the Indian to whom such allotment was made, or in case of his decease, either prior or subsequent to the issuance of such patent, of his heirs, according to the laws of the State of Washington, and that at the expiration of said period the United States will convey the

same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The same act provided that an allottee holding such a trust patent might sell the lands covered thereby, except eighty acres, under rules and regulations prescribed by the Secretary of the Interior; and provided that any conveyance or contract of sale made within the trust period except as provided by the act, should be absolutely null and void.

The plaintiff in error contends (1) that the land allotted to Long Jim in the year 1894 passed to him in fee under the terms of the Moses Agreement and the act of ratification, and therefore passed to the plaintiff under the deed of 1900; and, failing this, (2) that the deed, having contained covenants of warranty, operated by way of estoppel to pass to the plaintiff the title afterwards acquired by Long Jim by virtue of the patent of August 2, 1905.

In *United States* v. *Moore*, 154 Fed. Rep. 712, it was held by the United States Circuit Court for the Eastern District of Washington that lands allotted to Indians in severalty under the Moses Agreement and the act of confirmation, and the Executive Order of May 1, 1886, became vested in the allottees in fee simple. The Circuit Court of Appeals reversed this decision. 161 Fed. Rep. 513. The Supreme Court of Washington, in the present case (52 Washington, 138), followed the reasoning and opinion of the Court of Appeals. We concur in the result reached, and have little to add.

As to the principles to be kept in view in construing an agreement with the Indians, we adhere to what was said in *Jones* v. *Meehan*, 175 U. S. 1, 10, 11,—

"In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of

a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The Moses Agreement is quite informal, and it has been and should be construed in such manner as to confer upon the Indians the full measure of benefit that it was intended to secure to them. But it hardly follows that they would be more benefited by having the lands in fee than by having them held in trust for them by the Government. That part of the agreement now in question provided that each head of family or male adult on the Columbia Reservation should be entitled to one square mile of land—"in the possession and ownership of which they shall be guaranteed and protected." This is at least as consistent with a beneficial ownership, leaving the title in the Government, as with the vesting of a fee simple title in the Indian.

But whatever may have been the intent of the framers of the agreement, § 2079, Rev. Stat., prohibited the making of any contract with the Indians by treaty; and the Moses Agreement was expressly made "upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement." The act of confirmation (23 Stat., c. 180) was subject to the proviso that the Secretary of the Interior should cause the quantity of land stipulated to be selected in as compact

form as possible, "the same, when so selected, to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws," etc. Irrespective of the general recognition of the guardianship of the Government over the Indians, the clear antithesis in this proviso between the disposition of other lands to settlers and the retention of the lands in question for the use and occupation of the Indians, admits of but one construction.

The Executive Order of August 1, 1886, is consistent with this. So are the decisions of the General Land Office and the Secretary of the Interior, already referred to, (16 L. D. 15; 32 L. D. 568).

And the act of March 3, 1905 (33 Stat. 1048, 1064, c. 1479), above quoted, expressly authorizing and directing the Secretary of the Interior to issue a patent to Long Jim for the lands that had been allotted to him, is a recognition by Congress that without the act he had no right to the land in fee. Further corroboration is to be found in the act of March 8, 1906 (35 Stat. 55, c. 629), above quoted, which requires patents to be issued, with a restriction against alienation, to the other beneficiaries of the Moses Agreement.

The contention of the appellant that Long Jim had a title in fee at the time of the making of the warranty deed in the year 1900 must therefore receive a negative response.

As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow Estop., 2d ed., p. 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one *non sui juris*, or that is contrary to public policy or statutory prohibition. *Bank of*

America v. *Banks*, 101 U. S. 240, 247; *Doe* v. *Ford*, 3 Ad. & El. 649; *Den ex dem. Wooden* v. *Shotwell*, 24 N. J. L. 789; *Connor* v. *McMurray*, 2 Allen (Mass.), 202, 204; *Doyle* v. *Coburn*, 6 Allen, 71, 72; *Merriam* v. *Boston &c. Railroad Co.*, 117 Massachusetts, 241, 244; *Brick* v. *Campbell*, 122 N. Y. 337, 346; *Kennedy* v. *McCartney*, 4 Porter (Ala.), 141, 158.

Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel.

Judgment affirmed.